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IN THE

# Supreme Court of the United States

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MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
*Petitioner*,

v.

FRIENDS OF MILWAUKEE'S RIVERS AND
LAKE MICHIGAN FEDERATION,
*Respondents*.

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Clean Water Act forbids citizen enforcement suits when a "State has commenced and is diligently prosecuting a civil . . . action in a court of . . . a State to require compliance with the standard, limitation, or order" allegedly violated. 33 U.S.C. § 1365(b)(1)(B).

This case raises the following questions:

1. Whether a final state court order requiring a publicly owned wastewater treatment works to comply with a State's remediation plan bars continuation of a federal court citizen suit asserting the same violations, either as a matter of res judicata or because of the State's "diligent[] prosecut[ion]."

2. When a state court order is entitled to preclusive effect against citizen plaintiffs under state law (and, therefore, under 28 U.S.C. § 1738 and *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985)), whether a federal court may refuse to give that order preclusive effect until it independently decides, after a detailed examination of the order's remedial plan, that there is no "realistic prospect" of continued violations after the plan's projects are completed.

## PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioner, defendant-appellee below, is Milwaukee Metropolitan Sewerage District, a special purpose entity organized under Chapter 200 of the Wisconsin Statutes. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents, plaintiffs-appellants below, are Friends of Milwaukee's Rivers and Lake Michigan Federation.

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner, Milwaukee Metropolitan Sewerage District ("MMSD"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals, *see infra* Appendix to Petition ("Pet. App.") at 1a-33a, is reported at 382 F.3d 743 (7th Cir. 2004). The opinion of the district court, Pet. App. 34a-57a, is reported at 2003 WL 23864869 (E.D. Wis. Sept. 29, 2003).

## JURISDICTION

The court of appeals entered judgment on September 2, 2004. Pet. App. 1a. The court denied a timely petition for

rehearing on October 1, 2004. Pet. App. 63a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTES INVOLVED

This petition presents important questions involving the statutory provision barring citizen suits under § 505 of the Clean Water Act (the "Act" or "CWA"), 33 U.S.C. § 1365, when a State diligently prosecutes the same alleged violations. The CWA, 33 U.S.C. § 1251, *et seq.*, makes it unlawful to discharge any pollutant into navigable waters except as specifically authorized. *See* 33 U.S.C. § 1311(a). The Act allows the Administrator of the Environmental Protection Agency ("EPA") or a State that establishes and administers a program meeting federal guidelines to issue permits authorizing the discharge of pollutants in accordance with specified conditions. *See* 33 U.S.C. § 1342(a) & (b). Violations of a state-issued permit are subject to both federal and state enforcement actions. *See* 33 U.S.C. § 1319; *see also* Wis. Stat. §§ 283.31, 283.89, 283.91, 299.95.

In the absence of federal or state enforcement, the Act permits private citizens to commence a civil action against any person alleged to be violating a permit. 33 U.S.C. § 1365(a)(1). "[T]he citizen suit is meant to supplement rather than to supplant governmental action." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987). Congress specifically did not authorize citizens to seek remedies that the government "chose to forgo." *Id.* at 61.

To protect against citizen suit intrusions on government enforcement, the Act requires private parties to give the EPA and the State sixty days' notice of their intent to commence an action. 33 U.S.C. § 1365(b)(1)(A). If, before the expiration of that period, the government has "commenced and is diligently prosecuting, . . . [an] action . . . to require compliance" with the permit, the citizen suit is barred. 33

U.S.C. § 1365(b)(1)(B). Whether this diligent prosecution provision excepts citizen suits from 28 U.S.C. § 1738's requirement that state "judicial proceedings . . . shall have the same full faith and credit in every court . . . as they have by law . . . in the courts of such State . . . from which they are taken," 28 U.S.C. § 1738, is one of the important questions this petition presents.

## STATEMENT

The Seventh Circuit held that respondents, two citizen groups claiming "a long history of involvement in clean water activities" (C.A. S. App. 96-97), could continue prosecuting MMSD for alleged CWA violations that the State of Wisconsin resolved through a final state court order. That order, which incorporates a stipulation between the State and MMSD, requires MMSD to spend over $900 million on corrective system improvements. Reversing the district court, the Seventh Circuit held that neither the State's prosecution of MMSD nor the res judicata effect of the state court order barred respondents' action.

Although the district court concluded that the state court order requires substantial remedial measures (Pet. App. 54a-55a), the court of appeals took the view that those measures were "a stalling tactic rather than a compliance strategy." Pet. App. 32a. Having announced this view, the Seventh Circuit instructed the district court to allow respondents' action to proceed, unless the court determines, after a "detailed examination" of the state-ordered remedial projects (*id.* at 33a), that the State met the Act's diligent prosecution standard. *Id.* at 22a, 33a. This diligent prosecution standard, the Seventh Circuit ruled, requires that the State's remedies leave "no realistic prospect that violations due to the same underlying causes . . . will continue after the planned improvements are completed." *Id.* The court of appeals thus interpreted the Act to permit federal courts exercising citizen

suit jurisdiction to interfere with a State's choice of remedies, even when those remedies are mandated by a final state court order.

This interpretation is inconsistent with the Act's text, which bars a citizen plaintiff from *commencing* an action when the State is diligently prosecuting the same alleged violations. It is also inconsistent with the exegesis of the citizens' enforcement role in *Gwaltney,* where this Court ruled that Congress intended the citizen suit as a means of supplementing, rather than supplanting, governmental enforcement. 484 U.S. at 60. Adhering to that interpretation, other courts of appeals, applying either res judicata or the Act's diligent prosecution bar, have held that when the government has ordered remedial measures, citizens may not maintain an action simply because, in their view, the government "has not acted aggressively enough." *Ellis v. Gallatin Steel Co.*, No. 02-6421, __ F.3d ___, 2004 WL 2382166, at *12 (6th Cir. Oct. 26, 2004).

**1. Wisconsin's Regulation of MMSD.** MMSD provides wastewater treatment services for twenty-eight municipalities in southeast Wisconsin. MMSD collects the wastewater from these municipalities through a system of interceptor sewers, treats it at one of two facilities, and releases the treated water into Lake Michigan. Wisconsin has authorized MMSD's release of water into Lake Michigan through a series of permits issued by the Wisconsin Department of Natural Resources ("WDNR") and approved by the EPA.

This case arises as a result of "overflows" into Lake Michigan and Milwaukee-area rivers. In times of particularly heavy rain, storm water enters MMSD's system. On some occasions, the storm water exceeded sewer capacity and MMSD was required to release some water before treatment in order to avoid sewer backups and the resulting property damage. The WDNR regulates and closely monitors these

overflows, which are permitted in some circumstances. *See* Pet. App. 35a-36a. Extremely heavy rainstorms in 1998 and 1999 caused a number of overflows.

Following these overflows, the WDNR, by January 2000, had begun an in-depth investigation into MMSD's operations. In July 2001, WDNR formally notified MMSD of its conclusion that several of the overflows were violations. Pet. App. 40a. The WDNR informed MMSD that corrective action was required, including significant capacity expansions, upgrades to MMSD's monitoring and modeling systems, and the adoption of rules to require municipalities to reduce storm water infiltration into the system. Although MMSD disputed the WDNR's contention that the overflows violated its permit (*id.* at 41a), MMSD entered into negotiations with the WDNR concerning a potential corrective plan. The WDNR insisted that the corrective plan be both legally binding and approved by a court.

On July 11, 2001, respondents notified MMSD and the State that they intended to sue MMSD for CWA violations based on the overflows.

In August 2001, the WDNR and MMSD, after lengthy negotiations, reached agreement on a long-term corrective plan. Among other things, the resulting plan required MMSD to complete by specified dates three major sewer capacity expansion projects and several other facility improvements. The estimated cost of the projects was over $900 million.

The WDNR formalized the plan in a written stipulation (the "2001 Stipulation") and referred the matter to the Wisconsin Department of Justice ("WDOJ"). The WDOJ, seeking to have the 2001 Stipulation entered as an order, filed it in the Wisconsin Circuit Court for Dane County in an

existing case between the State and MMSD.[1] For procedural reasons, the Dane County judge declined to enter the order.[2]

On the same day the State filed the 2001 Stipulation, MMSD gave a copy of it to respondents. At respondents' request, representatives of WDNR, EPA, and MMSD met with them on December 20, 2001, to discuss the State's compliance plan. At the meeting, the State and respondents agreed not to commence any new legal proceedings before March 15, 2002. In the interim, respondents agreed to provide written comments on the State's compliance plan.

From January through early March 2002, respondents commented on the compliance plan, largely suggesting modifications in the timing of some projects, greater descriptive details, and penalties. Respondents further contended that MMSD should pay their attorneys' fees and costs. During the same period, the EPA also reviewed the compliance plan and provided its comments to the State. Pet. App. 43a-46a (describing EPA's involvement).

**2. Respondents and the State Sue MMSD on the Same Day in Separate Courts.** On March 15, 2002, both respondents and the State filed new actions against MMSD. At 7:57

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[1] In 1975, MMSD had commenced an action against the State in the Dane County Circuit Court to challenge WDNR's treatment standards for municipal wastewater facilities. The WDNR counterclaimed, alleging that MMSD had violated its permit because of, among other things, overflows. The parties settled that case through a stipulation and order, entered in 1977 by the Dane County Circuit Court, under which MMSD agreed to spend over $2 billion during the subsequent 20 years to construct major system improvements. On ten occasions during 1977-1994, the Dane County Circuit Court entered orders adopting stipulations that modified the original stipulation and order.

[2] On October 19, 2001, the Dane County judge notified the parties that because of the existing case's age, she did not view it as an appropriate vehicle for entering the 2001 Stipulation as a court order. C.A. MMSD S. App. 050-51.

a.m., respondents commenced this action invoking the district court's jurisdiction under the citizen suit provision of the CWA, 33 U.S.C. § 1365(a), as well as under 28 U.S.C. § 1331. Respondents alleged that several overflows between January 1995 and March 2002 were in violation of MMSD's permit and the Act. Respondents requested injunctive relief, civil penalties, and an award of costs and fees.

Later that day, the State sued MMSD in the Wisconsin Circuit Court for Milwaukee County. The State sought forfeitures, penalties, assessments, costs, fees, and injunctive relief for alleged violations during the same period as pleaded in respondents' action. Respondents never attempted to intervene in that case or in the Dane County case.

On May 29, 2002, the State filed in the Milwaukee County Circuit Court a revised stipulation (the "Final Stipulation") that incorporated the EPA's comments on the compliance plan. Pet. App. 44a-46a. This Stipulation resolved all claims relating to alleged permit violations that preceded its date of execution. *Id.* at 54a. Like the 2001 Stipulation filed in Dane County, the Final Stipulation requires MMSD to spend over $900 million to improve its system capacity and to redress overflow violations. *Id.* at 45a. It also provides that the State, in order to obtain structural changes and eliminate prohibited overflows, has chosen to forgo possible monetary sanctions in favor of a binding corrective action program. *Id.*

The Milwaukee County Circuit Court entered a final order approving the Final Stipulation that expressly requires MMSD to "undertake the activities described in the . . . stipulation" and to "comply in all respects with its obligations as set forth in [the] stipulation." Pet. App. 86a.

**3. The District Court's Dismissal of Respondents' Suit.** After the Milwaukee County Circuit Court entered its order approving the Final Stipulation, MMSD moved to dismiss this citizen action as barred by the State's diligent prosecution

under § 1365(b)(1)(B) and by res judicata. The district court granted MMSD's motion to dismiss on both grounds. Pet. App. 34a-65a.

In assessing diligent prosecution, the district court held that by filing the 2001 Stipulation in the Dane County case, the State had "commenced" a civil enforcement action. *Id.* at 53a. The district court rejected on two grounds respondents' contention that the State's prosecution had not been diligent. First, the district court applied the prevailing principle that "diligence on the part of the enforcement agency is presumed." *Id.* at 49a. Second, the court concluded that the State's compliance plan sufficed to establish diligence. It based this conclusion in part on the fact that "the Final Stipulation expresses the 'intent of the parties' to present 'a comprehensive solution to sanitary sewer overflows, regardless of their cause.'" *Id.* at 54a. The district court further based its conclusion that the State had "diligently prosecut[ed]" on its finding that the Final Stipulation, which was incorporated into the state court's final order, requires substantial modifications to MMSD's systems:

> The Final Stipulation requires significant changes to MMSD's current operating structure at considerable expense. MMSD must complete construction of a 7.4 mile, 20 foot diameter relief sewer on the northwest side of Milwaukee to add 89 million gallons of storage capacity by December 31, 2006, construct two additional sewers adding 27 million gallons of conveyance capacity by December 31, 2009, and complete over 100 treatment plant and interceptor sewer upgrade projects. In addition, MMSD is obligated to finalize its sanitary sewer evaluation study and to require satellite municipalities to achieve a 5% reduction of infiltration and inflow by December 31, 2002.

*Id.* at 54a-55a.

The district court alternatively held that res judicata barred respondents' claims, which arose out of the same occurrences as those alleged by the State. *Id.* at 55a. Although respondents chose not to participate in the State's enforcement action, the district court concluded that they were necessarily in privity with the State. *Id.* "[I]n situations such as this," the court wrote, "the citizens' action provision of the CWA casts the citizen in the role of a private attorney general, thereby satisfying the privity requirement." *Id.*

**4. The Court of Appeals' Decision.** The Seventh Circuit reversed, concluding that the State's filing of the 2001 Stipulation in Dane County was a "non-diligent prosecution." Pet. App. 12a.

The Seventh Circuit also rejected the district court's res judicata holding. Although the court agreed that the citizens were litigating the same causes of action, the court held that whether the citizens were in privity with the State required a "detailed examination" of the State's enforcement of the Act. Privity, the court stated, depends on whether the State diligently prosecuted, as that term is used in § 1365(b)(1)(B):

> [I]n order for the state agency to be in privity with the public's interests, the state's subsequently-filed government action must be a diligent prosecution. . . . **We look to the language of the Act to find out what is meant by "diligent prosecution."** Citizens' suits are barred "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State *to require compliance with the standard, limitation, or order.*" 33 U.S.C. § 1365(b)(1)(B) (emphasis added).

*Id.* at 22a (italics in original, bold added).

Applying this diligent prosecution approach to the privity inquiry, the Seventh Circuit rejected the district court's conclusion that the Final Stipulation's remedial plan demonstrated diligence by the State. *Id.* at 24a, 29a-32a. The

court refused to credit the Stipulation's provision that the parties, including the State, viewed it as "present[ing] a comprehensive solution to sanitary sewer overflows, regardless of their cause . . . [and] resolv[ing MMSD's] potential liability for all alleged sanitary sewer overflows . . ." (Pet. App. at 70a-71a). *See* Pet. App. 24a, 31a. The court's only justification for ignoring these statements is its unexplained aspersion that they are "self-serving." *Id.* at 24a, 31a.

Additionally, the Seventh Circuit, while saying it recognized that the Act requires deference to the State's enforcement decisions, *see id.* at 23a-24a, presumed the opposite—that the state-mandated compliance measures are *not* calculated to ensure compliance. Despite the State's assurance in the Stipulation that the corrective actions it required presented a "comprehensive solution," the court adopted the view that the Final Stipulation's compliance plan is "a stalling tactic rather than a compliance strategy." *Id.* at 32a.

To reach this opinion, the panel relied on misinterpretations of MMSD's statements that the state-ordered projects would "reduce" (rather than "eliminate") overflows and on its perception of "recent events"—*i.e.*, events occurring after the district court dismissed respondents' action. *Id.* at 30a-33a. In forming this perception, the court appears to have looked to irrelevant hearsay—newspaper articles reporting alleged overflows that occurred after the Final Stipulation was executed but before its compliance programs could be completed. *See id.* at 3a n.1, 6a n.3, 27a n.12, 31a n.14. (These articles, which were published after the court of appeals heard oral argument, are not in the record, and the court afforded MMSD neither notice nor an opportunity to respond to their content.)

Concluding that it could not "state with *certainty* . . . whether the [Final] Stipulation is calculated to result in compliance with the Act" (*id.* at 32a (emphasis added)), the Seventh Circuit instructed the district court to determine, after

making a "detailed examination" of the State's compliance program, whether the State met the diligent prosecution standard the Seventh Circuit reads into the Act (*id.* at 33a). The court instructed further that the citizens must be allowed to continue their collateral attack on the State's compliance measures unless the district court concludes that "there is no realistic prospect that violations due to the same underlying causes . . . will continue after the planned improvements are completed." *Id.*

On petitioner's request for rehearing and rehearing en banc, the court of appeals modified its description of the facts but denied rehearing. Pet. App. 63a-64a.

## REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision requires federal courts independently to examine the efficacy of a State's chosen compliance measures, even when the State obtains a final state court order commanding those measures. Under the court's application of the diligent prosecution provision, res judicata can only preclude such a suit (alleging the same violations as the government), if the district court makes an independent determination that the government's remedial measures ensure that there is no "realistic prospect" of future violations.

This construction invites citizens unhappy with a State's choice of remedies to ask a federal court for a second opinion on the merits of the State's relief. The decision thus fails to afford final state orders the full faith and credit to which they are entitled under 28 U.S.C. § 1738 and misapplies the diligent prosecution bar on citizen suits in a manner that conflicts with the decisions of other courts of appeals.

This conflict in the construction of the citizen suit provision—a provision common in environmental statutes[3]—is a

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[3] *See* 15 U.S.C. § 2619 (Toxic Substances Control Act); 42 U.S.C. § 6972 (Resource Conservation and Recovery Act); 42 U.S.C. § 7604

matter of substantial importance. The Seventh Circuit's interpretation significantly expands the enforcement role of citizen plaintiffs and federal courts at the expense of government regulatory agencies. In so doing, the Seventh Circuit, unlike the three other courts of appeals discussed below, has failed to heed this Court's warning in *Gwaltney* that allowing citizen plaintiffs to use the federal courts to second-guess government enforcement decisions risks "undermin[ing] the supplementary role envisioned for the citizen suit." 484 U.S. at 60. Indeed, the Seventh Circuit creates the very danger about which *Gwaltney* warned:

> If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably. The same might be said of the discretion of state enforcement authorities. Respondents' interpretation of the scope of the citizen suit would change the nature of the citizens' role from interstitial to potentially intrusive. We cannot agree that Congress intended such a result.

*Id.* at 61.

Under the Seventh Circuit's approach, no government enforcement is final and authoritative until a federal court takes up the role of environmental protection super-agency and concludes that alleged violations "will be sufficiently ameliorated by the proposed remedial projects." Pet. App. 32a. Besides being inconsistent with the role Congress intended for citizen suits, this construction is inconsistent with this Court's teachings that, when Congress leaves enforcement of broad statutory mandates to government agencies, courts should defer to those agencies' reasonable

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(Clean Air Act); 42 U.S.C. § 11046 (Emergency Planning and Community Right-to-Know Act).

decisions regarding the best manner of ensuring compliance. As this Court stated last Term in an analogous context:

> If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.

*Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373, 2381 (2004).

Consistent with these teachings, other federal courts, including the First, Sixth, and Eighth Circuits, have held that when a government enforcement agency orders compliance measures, citizen suits have no continuing enforcement role. Had this case arisen in one of those circuits, the State's prosecution would have been presumed "diligent" and would have been preclusive of this citizen action, either by application of res judicata or by application of the Act's diligent prosecution bar.

This Court should grant the petition to resolve this conflict and address these important issues concerning when citizen plaintiffs can wage a collateral attack in federal court against a State's enforcement of the CWA.

## I. THE SEVENTH CIRCUIT'S CONSTRUCTION OF THE DILIGENT PROSECUTION BAR TO AUTHORIZE COLLATERAL ATTACKS ON FINAL STATE COURT ORDERS VIOLATES 28 U.S.C. § 1738 AND CONFLICTS WITH DECISIONS OF THE EIGHTH CIRCUIT.

### A. The Seventh Circuit's Misuse of the Act's Diligent Prosecution Provision to Limit Application of Res Judicata Fails to Afford the State Court's Final Order the Full Faith and Credit Required by 28 U.S.C. § 1738.

The Seventh Circuit held that the Milwaukee County Circuit Court's order enforcing the Final Stipulation could not preclude respondents' suit unless the stipulation's compliance measures constituted a diligent prosecution under § 1365(b)(1)(B). This holding erroneously extends federal law to limit the effect of a state court order, in violation of the full faith and credit statute. 28 U.S.C. § 1738.

Section 1365(b)(1)(B) does not free citizen suits from the preclusive effects of state court orders. The Sixth Circuit recently made this point: "The 'diligent prosecution' requirement . . . represents a limitation on a citizen's ability to file suit, not a limitation on the effect of subsequent governmental action on a citizen's right to maintain the suit." *Ellis*, 2004 WL 2382166, at *9.

The res judicata effect of final state court orders depends instead on the preclusion law of that State. 28 U.S.C. § 1738 (judicial proceedings of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken"). *See Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). The Seventh Circuit recited this principle as if by rote, but it failed to apply it. Instead, the court erroneously held that a state

enforcement agency could only be in privity with citizens suing to enforce the Act if the enforcement agency met the Act's diligent prosecution standard. *See* Pet. App. 22a.

By creating and importing a federal law privity principle, the Seventh Circuit ignored Wisconsin law under which persons with the same legal interests are held, as a matter of law, to be in privity. *See Gerhardt v. Estate of Moore,* 139 Wis. 2d 833, 840-45, 407 N.W.2d 895, 898-900 (1987).[4] Unlike the privity concept the Seventh Circuit created, Wisconsin law holds that one in privity with a party to a final order is bound by that order regardless of the party's diligence in litigating the claim. *See id.* at 843, 407 N.W.2d at 899 (res judicata applied to privy when settlement of prior suit was "not unconscionable," although, "in hindsight, [it may] appear to be inadequate").

Moreover, the Wisconsin Supreme Court has never applied or adopted § 42(1)(e) of the RESTATEMENT (SECOND) OF JUDGMENTS (1982), on which the Seventh Circuit relied for its authorization to graft a federal diligent prosecution analysis onto Wisconsin preclusion law. And, even if Wisconsin would view that section of the Restatement as a persuasive pronouncement of the common law, the Restatement's commentary makes clear that only a showing of "collusion" or "grossly deficient" conduct is sufficient to relieve citizens of judgments entered in actions prosecuted on their behalf. *Id.*, cmt. f. Application of that deferential standard would have required the court of appeals to affirm the district court's conclusion that respondents' action is barred by res judicata.

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[4] *Vacated on other grounds*, 486 U.S. 1050 (1988), *rev'd on other grounds*, 150 Wis. 2d 563, 441 N.W.2d 734 (1989).

### B. In Conflict with the Eighth Circuit, the Seventh Circuit Concluded that the Act's Diligent Prosecution Provision Governs Whether Citizens Are in Privity with the Government.

In sharp contradiction to the Seventh Circuit's decision, the Eighth Circuit and other federal courts have concluded that the Act itself puts citizens in privity with government enforcement agencies. Reasoning from this Court's premise that the "central purpose" of the Act's citizen suit provision is to "permit[] citizens to abate pollution when the government cannot or will not command compliance," *Gwaltney*, 484 U.S. at 62, these courts conclude that the Act itself "casts the citizen in the role of private attorney general," *EPA v. City of Green Forest,* 921 F.2d 1394, 1403 (8th Cir. 1990), a role that entails privity with state and federal enforcers.[5]

Applying this principle and recognizing that Congress made citizens only secondary enforcers of the Act, the Eighth Circuit has reasoned that a government consent decree entered in a later-filed enforcement action necessarily precludes citizens from litigating the same alleged violations. In *Green Forest*, the EPA commenced and settled CWA claims that were the subject matter of a separate citizen action. *Id.* at 1400. The Eighth Circuit concluded that the CWA's structure required that it affirm the district court's dismissal of the earlier-filed citizen suit on res judicata grounds:

> In view of the preeminent role that must be afforded the EPA in enforcing CWA violations . . . we hold that it

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[5] *Cf. Citizens Legal Envt'l Network, Inc. v. Premium Standard Farms, Inc.*, No. 97-6073-CV-SJ-6, 2000 WL 220464, at *11 (W.D. Mo. Feb. 23, 2000) ("Congress itself enumerated the circumstances under which citizens and States are identical parties under the CWA."); Jeffrey G. Miller, *Theme and Variations in Statutory Preclusion Against Successive Environmental Actions by EPA and Citizens*, 28 Harv. Envtl. L. Rev. 401, 423-24 (2004) ("The legislative history of the CWA [citizen suit] provision also anointed a citizen enforcer as a 'private attorney general'").

> was proper for the district court to dismiss [the citizen's] CWA claims against Green Forest after the latter had entered into a consent decree with the EPA. The EPA is charged with enforcing the CWA on behalf of all citizens. Since citizens suing under the CWA are cast in the role of private attorneys general, as a practical matter there was little left to be done after the EPA stepped in and negotiated a consent decree.

*Id.* at 1404. Under the Eighth Circuit's interpretation of the CWA, citizens are free to sue only when federal and state governments fail to act:

> The Government, of course, as representative of society as a whole, usually is in the best position to vindicate societal rights and interests. In those instances where, for whatever reasons, the Government fails or declines to take action, the CWA allows citizens acting as private attorneys general to fill the void.

*Id.* at 1405 (quoting *Hudson River Fishermen's Ass'n v. County of Westchester,* 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988)).[6]

In this case, respondents allege generalized harm to their members' enjoyment of Lake Michigan. C.A. S. App. 97-98. Such alleged injuries to Wisconsin's water resources assert violations of public rights—rights for which the State has principal enforcement responsibility. *See R.W. Docks & Slips*

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[6] *See also Ellis*, 2004 WL 2382166, at *10 ("Congress has authorized citizen suits only when environmental officials *fail* to exercise their enforcement responsibility" (internal quote omitted) (emphasis in original)); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) (citizens' CWA claim barred by State's settlement of "suit to recover damages for injury to a sovereign interest"); *cf. Satsky v. Paramount Communications, Inc.,* 7 F.3d 1464, 1470 (10th Cir. 1993) ("When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment.").

*v. State,* 2001 WI 73, ¶19, 244 Wis. 2d 497, 509, 628 N.W.2d 781, 788 (recognizing that State's title to navigable waters under the public trust doctrine "has been expansively interpreted to safeguard the public's use of navigable waters for purely recreational purposes"); *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251, 258 (1972) (recognizing the "right of the State to sue as parens patriae to prevent or repair harm to its 'quasi-sovereign' interests"); *Georgia v. Tenn. Copper Co.,* 206 U.S. 230, 237 (1907) (describing State's "*quasi*-sovereign" interest "in all the earth and air within its domain" (italics in original)); *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892) (State holds title to the navigable waters of Lake Michigan "in trust for the people of the State").

There is, moreover, no question whether the State took action to enforce the Act in order to protect these public rights. The State investigated the overflows and negotiated a resolution that expressly provides for compliance with MMSD's permit. Indeed, even the Seventh Circuit acknowledged that the State's court-ordered Final Stipulation required MMSD to undertake significant remedial actions.[7] *See* Pet. App. 5a-6a, 23a. Given the primacy accorded government enforcement by the Act, that should be the end of the matter.

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[7] Therefore, this is not a case like *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), in which the State was apparently complicit in the defendant's effort to preclude a citizen suit. *See id.* at 178 n.1. Moreover, the defendant in *Laidlaw* forfeited its res judicata defense in the district court, *see Friends of the Earth, Inc. v. Laidlaw Envt'l Servs., Inc.*, 890 F. Supp. 470, 486 n.7 (D.S.C. 1995), and this Court's review was limited to whether the citizens had standing and a justiciable claim; it did not address the potential preclusive effect of the state court order. *See* 528 U.S. at 180-95. *Laidlaw* thus leaves open the questions presented here on which the circuits are in conflict—whether a State's good faith efforts to obtain compliance through court-ordered remedial projects is preclusive, as a result either of res judicata or the Act's diligent prosecution bar, of citizens' efforts to obtain supplanting federal court relief.

Although it would be the end of the matter in the Eighth Circuit, the Seventh Circuit remanded for a "detailed examination" of the court-ordered Final Stipulation. While paying lip service to the need to "giv[e] some deference to the judgment of the State" (Pet. App. 33a), the court instructed the district court to permit the citizens to proceed with litigation designed to second-guess whether over $900 million in capacity expansion and operational upgrades will "sufficiently ameliorate[]" "the systemic inadequacies of MMSD's sewerage facilities." Pet. App. 32a-33a. In so doing, the Seventh Circuit gives respondents free rein to convince the district court to substitute its views (or the Seventh Circuit's fairly clear intimation of what those views should be) for those of government regulators. Thus, on the important issue of whether final orders in government enforcement actions preclude citizen suit litigation of the same alleged violations, the Seventh Circuit's decision is squarely at odds with the Eighth Circuit's *Green Forest* decision. *See also Comfort Lake Ass'n, v. Dresel Contracting, Inc.,* 138 F.3d 351, 356 (8th Cir. 1998) ("Even when an agency enforcement action is not commenced until after the citizen suit, final judgment in the agency's court action will be a res judicata or collateral estoppel bar to the earlier citizen suit."); *Ellis,* 2004 WL 2382166, at *8 ("The touchstone of res judicata effect, however, is the consent decree itself, which resolves all claims 'through the date of entry' of the decree"). *Cf. Supporters to Oppose Pollution, Inc. v. Heritage Group,* 973 F.2d 1320, 1324 (7th Cir. 1992) (Easterbrook, J.) (analogous citizen suit provision of the Resource Conservation and Recovery Act "does not authorize a collateral attack on the agency's strategy or tactics").

## II. THE SEVENTH AND SECOND CIRCUITS' INTERPRETATION OF THE DILIGENT PROSECUTION PROVISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

In adopting an interpretation of § 1365(b)(1)(B)'s diligent prosecution provision that requires the district court to second-guess the State's choice of remedy, the Seventh Circuit followed the Second Circuit's decision in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991). There, after citizens sued Kodak for violating the CWA, Kodak settled with the State, agreeing to pay penalties and plead guilty to a state criminal violation in exchange for a release from further criminal liability and penalties. *Id.* at 126. The district court granted Kodak summary judgment in the citizen suit action, but the Second Circuit reversed, reasoning that private enforcement could proceed if there remained "a realistic prospect that the violations alleged . . . will continue." *Id.* at 127.

Both the Second Circuit's *Kodak* decision and the Seventh Circuit's decision below misinterpret the diligent prosecution provision's limitation on citizen suits. The purpose of the diligent prosecution provision is to allow the State to decide—without citizen suit interference—what remedies are in the public's best interest. *See Gwaltney*, 484 U.S. at 60; *Arkansas Wildlife Fed'n v. ICI Americas, Inc.*, 29 F.3d 376, 380 (8th Cir. 1994). The provision thus preserves the Congressional preference for enforcement by experienced government agencies by authorizing citizens to litigate only after they give notice of their intent to sue and the State fails to act, not when the State acts and some citizens believe it should do more.

Recognizing this Congressional preference, other courts of appeals presume that whenever the State procures affirmative relief through litigation its prosecution is "diligent." The most recent example of this conflicting statutory interpre-

tation is the Sixth Circuit's decision in *Ellis*. There, citizens commenced an action against a steel manufacturer and a slag processor under the citizen suit provision of the Clean Air Act ("CAA") (a provision that in all material respects is the same as § 1365). 2004 WL 2382166, at *3. Over a year after the citizens commenced their suit, the EPA, which had earlier begun an action to enforce the CAA against the same parties, amended its complaint to add claims overlapping the citizens' claims and filed proposed consent decrees resolving those claims. *Id.* Like the Final Stipulation here, the consent decrees in *Ellis* required the defendants to undertake a variety of compliance measures to reduce the emission of pollutants. *Id.* at *11. Also like the Final Stipulation here, the consent decrees in *Ellis* "specifically contemplated some time for implementing their terms." *Id.*

The district court in *Ellis* both approved the government's consent decrees and granted the citizens' request for injunctive relief, which, among other things, required increased emission monitoring beyond that called for by the government. *Id.* at *10. In defending this award of relief on appeal, the *Ellis* citizens, like the Seventh Circuit below, relied on the Second Circuit's holding in *Kodak* that "citizen plaintiffs may maintain their lawsuits after the Government has resolved claims regarding earlier violations when there is a 'realistic prospect' of the alleged violations continuing." *Id.* at *13. The Sixth Circuit disagreed.

Rejecting the principle that citizen suits may continue after government enforcement, the Sixth Circuit stated, "[g]enerally speaking, when the contours of a private plaintiff's suit and the Government's suit coincide . . . the former must be dismissed." *Id.* at *11. The court also rejected the Second (and now the Seventh) Circuit's approach of requiring an inquiry into the effectiveness of the government's remedy. Fidelity to the Act's distribution of enforcement authority, the court reasoned, requires that government decrees affording

prospective relief be "allowed to work" before being subjected to challenge by citizens. *See id.* at *13.

As the Sixth Circuit explained, once a government agency enforces environmental laws against an alleged violator, the structure and purposes of those laws require a moratorium on further citizen litigation of the same violations in order to allow time for the alleged violator to carry out the government's remedial directives. *See id.* at *11-12. If a citizen then reasonably believes that the government's remedies are proving inadequate, it must give a new notice of intent to sue based on the post-consent decree violations. *Id.* This construction is consistent with the Act's structure and purposes because it affords the defendant an opportunity to address any claimed inadequacies before having to defend additional litigation. *Id.*

The Seventh Circuit's decision, in contrast, provides MMSD no similar opportunity. Instead, MMSD must litigate immediately whether the compliance measures the State has directed it to implement will "sufficiently ameliorate[]" "the systemic inadequacies of MMSD's sewerage facilities." Pet. App. 32a-33a.

The Sixth Circuit is not alone in prohibiting what the Seventh Circuit here allows. The First Circuit similarly prohibited citizens from collaterally attacking the effectiveness of government remedies in *North & South Rivers Watershed Association v. Town of Scituate,* 949 F.2d 552, 557 (1st Cir. 1992). There, to resolve a claim that the town of Scituate was violating the CWA by releasing unpermitted wastewater, the Massachusetts Department of Environmental Protection issued an order requiring the town to "(1) immediately prohibit any new connections to its sewer system; (2) take all steps necessary to plan, develop and construct new wastewater treatment facilities; and (3) begin extensive upgrading of the facility subject to [the Department's] review and approval at interim stages . . . ."

*Id.* at 553-54. Two years later, citizens sued the town, alleging violations of the Act based on the same discharges that formed the basis for the State's order. *Id.* at 554. The citizens argued that they were entitled to demonstrate that the State had not done enough to enforce the order and that its action constituted "diligent *non*-prosecution."[8] *Id.* at 557 (emphasis added) (internal quotation omitted).

In affirming the district court's dismissal, the First Circuit reasoned that, because government enforcement enjoyed statutory primacy, the State's order, which addressed the very violations at issue, was entitled to great deference: "Where an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *Id.* Given this deferential treatment, the First Circuit had little difficulty concluding that the order "represents a substantial, considered and ongoing response to the violation, and that the [Department's] enforcement action does in fact represent diligent prosecution." *Id.*

Following the First Circuit, the Eighth Circuit in *Arkansas Wildlife Federation*, 29 F.3d 376, also held that a consent order issued by a government enforcement agency bars a citizen suit based on the same alleged CWA violations.[9] The citizens in *Arkansas Wildlife* attempted a collateral attack on the State's choice of remedies, contending that the State's prosecution was not diligent because it had "failed to address [defendant] ICI's violations, gave ICI repeated extensions for compliance, and assessed insignificant amounts of civil

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[8] Like state civil or criminal actions, state administrative actions are preclusive of citizen suits if they are "diligently prosecuted." *See* 33 U.S.C. § 1319(g)(6)(A).

[9] Like *North & South Rivers*, *Arkansas Wildlife* addressed whether a State's administrative action was diligently prosecuted under § 1319(g)(6)(A).

penalties . . . ." *Id.* at 380. In affirming the district court's dismissal of the citizens' suit, the Eighth Circuit (like the First and Sixth Circuits) recognized that citizen suits "are proper only when the federal, state, or local agencies fail to exercise their enforcement responsibility, and that such suits should not considerably curtail the governing agency's discretion to act in the public interest." *Id.* "It would be unreasonable and inappropriate," the court concluded, "to find failure to diligently prosecute simply because ICI prevailed in some fashion or because a compromise was reached." *Id.*

The conflict among these circuits' construction of the citizen suit provision is plain. The First, Sixth, and Eighth Circuits hold that citizen suits must stop once a government enforcement agency prosecutes the alleged violations and requires a defendant to perform remedial measures. The Second and Seventh Circuits, on the other hand, allow citizen suits to proceed under those circumstances unless a district court independently determines that the relief obtained by the government will ensure that there will be no continuing violations. This latter approach affords far less deference to enforcement agencies, instead requiring the district court to function as a sewerage engineer and predict the probable effect of billion dollar sewer construction projects. District courts are ill equipped to make these types of predictions. *Cf. Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) ("When reviewing this kind of scientific determination . . . a reviewing court must generally be at its most deferential").

Moreover, under the Seventh Circuit's interpretation of the Act, citizen plaintiffs, like respondents, may choose to eschew intervention in the government's enforcement proceedings in favor of asking a federal court to make an after-the-fact review of the government's choice of remedial measures. The Seventh Circuit has thus construed the Act to

provide citizen plaintiffs exactly the intrusive role in government enforcement that this Court has held inconsistent with Congress's intent and the Act's structure and purpose. *See Gwaltney*, 484 U.S. at 60-61.

One thing is clear. Had the court below applied the deferential approach taken by *Ellis*, *North & South Rivers* and *Arkansas Wildlife* to determine whether the State's prosecution was diligent, it would have affirmed. As in those cases, the record leaves no doubt that the order incorporating the Final Stipulation requires MMSD to adopt a substantial compliance program. It cannot be said, and the Seventh Circuit did not say, that the State "failed to take action." Thus, under the First, Sixth, and Eighth Circuits' construction of the Act, the State's final court order would bar respondents from continuing to litigate claims the State resolved.[10]

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[10] Many lower federal courts have also reasoned that the Act requires deference to government agencies' efforts to enforce the Act and presume the diligence of those agencies in prosecuting violations. *See, e.g., Clean Air Council v. Sunoco, Inc.*, No. 02-1553 GMS, 2003 WL 1785879, at *5-6 (D. Del. Apr. 2, 2003) (a citizen suit is barred unless the government's action is "totally unsatisfactory"); *Cmty. of Cambridge Envt'l Health & Cmty. Dev. Group v. City of Cambridge*, 115 F. Supp. 2d 550, 554 (D. Md. 2000) ("Most courts considering the diligence of a state or federal prosecution have exhibited substantial deference for the agency's process."); *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997) (the CWA calls for a deferential approach that does not "circumscribe" the enforcement agency's ability to implement its expert judgment on corrective measures); *Sierra Club v. Colo. Ref. Co.*, 852 F. Supp. 1476, 1483 (D. Colo. 1994) (affording deference to the State's plan of attack); *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 183 (D. Conn. 1991) ("The court must presume the diligence of the state's prosecution absent persuasive testimony that the state has engaged in a pattern of conduct in its prosecution that could otherwise be considered dilatory, collusive or otherwise in bad faith.") (internal quotation marks omitted) (quoting *Connecticut Fund for Env't v. Contract Plating Co.*, 631 F. Supp. 1291,

* * *

The Seventh Circuit has allowed respondents to wage a collateral attack on state-ordered remedial projects based on nothing more than "concerns" that those "remedial projects [might] . . . turn out to be too little, too late" (Pet. App. 32a n.15). The decision thereby leaves practically all state-mandated remedial orders open to annulment by federal courts acting at the request of citizen plaintiffs who choose to sit out state court proceedings. This expansion of the citizens' role interferes with government enforcement of the Act, improperly assigns to federal courts the task of environmental policymaking, and conflicts with decisions of the First, Sixth, and Eighth Circuits.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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1293 (D. Conn. 1986), *aff'd in part, rev'd in part,* 989 F.2d 1305 (2d Cir. 1993)).

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 03-3809

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FRIENDS OF MILWAUKEE'S RIVERS and
LAKE MICHIGAN FEDERATION,
*Plaintiffs-Appellants*,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
*Defendant-Appellee*.

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March 29, 2004, Argued
September 2, 2004, Decided

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OPINION

Before CUDAHY, ROVNER and DIANE P. WOOD, *Circuit Judges*.

CUDAHY, *Circuit Judge*. For decades, the defendant Milwaukee Metropolitan Sewerage District (MMSD) and its predecessor organization have, for various reasons, occasionally discharged untreated sewage directly into Lake Michigan and Milwaukee's rivers. The discharges were reduced in number and volume after MMSD's system's capacity was expanded by the Deep Tunnel, which was completed in 1994. However, discharges from sanitary sewers (which violate the *Clean Water Act* and MMSD's discharge permit) have persisted despite expectations that the Deep Tunnel would virtually eliminate them.

The plaintiffs, Friends of Milwaukee's Rivers and the Lake Michigan Federation (collectively, the plaintiffs), perceived a

lack of action by the State of Wisconsin and MMSD to eliminate these persistent sanitary sewer discharges. In 2001, the plaintiffs filed a notice of intent to bring a citizens' suit under the *Federal Water Pollution Control Act* (the Clean Water Act or the Act), 33 U.S.C. §§ 1251 *et seq.*, and in the early hours of March 15, 2002, they brought suit in federal court. The State of Wisconsin also filed suit later on the same day in Milwaukee County court, and within a few months, it reached a settlement with MMSD. The centerpiece of the consent agreement resulting from the Milwaukee County action provided, for additional expenditures of more than $ 900 million on several projects to further increase the capacity of MMSD's sewer system.

MMSD subsequently moved to dismiss the plaintiffs' federal suit as barred because the State of Wisconsin had taken judicial and administrative enforcement actions to diligently prosecute its violations of the Act. The district court, finding that the State of Wisconsin had indeed diligently prosecuted the violations alleged by the plaintiffs, dismissed for lack of subject matter jurisdiction because the suit was barred by the terms of the Clean Water Act. In the alternative, the district court found that the plaintiffs' suit would be barred by res judicata. The plaintiffs appeal both of these findings, and for the reasons that follow, we reverse.

## I. Background

MMSD is a state-chartered government agency providing wastewater services to 28 municipalities in southeast Wisconsin. MMSD's 420-square-mile service area includes all cities and villages within Milwaukee County (except the City of South Milwaukee), and all or part of 10 municipalities or sanitary districts in the surrounding counties of Ozaukee, Washington, Waukesha and Racine. Two types of municipality-owned sewer systems feed into MMSD's interceptor sewers: separate sewers and combined sewers. Separate sewers have separate pipes for storm water (which empties

directly into area waterways) and sanitary waste (which empties into MMSD's system where it can be treated). Combined sewers, which are mostly older sewer systems, are designed to carry both storm water and sanitary waste in the same pipes.[1] MMSD's discharge permit prohibits overflows from separate sanitary sewers except in very limited situations, though up to six discharge events are allowed annually from combined sewers as long as Lake Michigan's water quality does not suffer. (MMSD's Supp. Appx. at 142.)

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[1] There are advantages and disadvantages to combined sewer systems. The disadvantages were dramatically illustrated during the month of May 2004, when heavy rainfall resulted in the dumping of "an unprecedented 4.6 *billion* gallons of raw sewage" directly into Lake Michigan and Milwaukee area streams and rivers. Marie Rohde and Steve Schultze, *Sewage Dumped in May: 4.6 Billion Gallons*, MILWAUKEE J. SENTINEL, May 29, 2004, at 1A (emphasis added). The State accused MMSD of multiple violations for the portion of the 4.6 billion gallons attributable to separated sewers carrying only sanitary waste, which accounted for 500 million gallons. *See* Steve Schultze and Marie Rohde, *Sewerage District Denies Blame,* MILWAUKEE J. SENTINEL, July 3, 2004, at 1B. The remaining 4.1 billion gallons were attributable to discharges from combined sewer systems. Wisconsin's Department of Natural Resources has recently referred MMSD (along with 29 southeastern Wisconsin communities) to Wisconsin's Department of Justice for possible civil litigation. *See* Larry Sandier, *DNR Calls for Legal Action in MMSD Dumps,* MILWAUKEE J. SENTINEL, August 3, 2004, at 1B.

The advantages of combined sewer systems may be less obvious but should still be mentioned. In MMSD's combined sewer system, the often highly-contaminated runoff from most rainstorms and snowstorms is captured in the system and treated before being discharged. This allows Lake Michigan to be spared from "vast amounts of road salt, heavy metals, oil and grease" in all but the heaviest storms. George Meyer, *Separating Sewers Won't Do the Job,* MILWAUKEE J. SENTINEL, June 20, 2004, at 3J. Discharges from combined sewers are also diluted with storm water, which is estimated by WisDNR to make up 90% of overflows, while discharges from separated sewers involve undiluted sewage. *See id.;* Lee Bergquist, *Lake Can Take Some Pollution, But Experts Still Worry About Overflows, Runoff,* MILWAUKEE J. SENTINEL, July 12, 2004, at 1A.

Nearly thirty years ago, the State of Wisconsin (State)[2] entered into a stipulation (1977 Stipulation) with the predecessor organization of the defendant, MMSD. This stipulation resolved litigation that had commenced in 1976 in the Dane County Circuit Court over violations of MMSD's Wisconsin Pollutant Discharge Elimination System (WPDES) permit. The 1977 Stipulation acknowledged more than 60 historic violations of MMSD's WPDES permit and the Federal Water Pollution Control Act (the Clean Water Act or the Act), 33 U.S.C. §§ 1251 *et seq.*, but it did not require MMSD to pay any penalties or fines. Instead, MMSD was required to spend nearly $2 billion over the following 20 years on improvements to several woefully substandard aspects of MMSD's sewage treatment system. The main improvement was a "Deep Tunnel," which came on line in 1994. The Deep Tunnel increased the system's capacity by allowing up to 405 million gallons of untreated sewage to be temporarily stored during periods of heavy rain and then pumped back into MMSD's treatment facilities and treated before being discharged. Heavy rainfall taxes the system's capacity due to Milwaukee's combined sewers as well as improperly connected downspouts/drainage and leaks in the system that allow runoff and ground water to infiltrate.

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[2] Wisconsin has a "stepped" enforcement process that begins with meetings between the Department of Natural Resources (WisDNR) and the violator or with the issuance of a warning letter (Notice of Non-Compliance). (Plaintiffs' Supp. Appx. at 278.) If the conditions causing the violation are not resolved, WisDNR can issue a formal notice of violation. *Id.* If the violator does not take corrective action, WisDNR refers the matter to the Wisconsin Department of Justice (WisDOJ) to initiate judicial action with which WisDNR remains involved. (MMSD's Br. at 39.) For ease of reference, when discussing judicial and administrative actions taken by Wisconsin state agencies against entities that violate the Act, we will refer to the Wisconsin Department of Natural Resources (WisDNR), the Wisconsin Attorney General and the Wisconsin Department of Justice (WisDOJ) generically as "the State." In other contexts and as necessary, the agencies will be referred to individually.

Although the Deep Tunnel undeniably has reduced the number and volume of both sanitary sewer overflows (SSOs) and combined sewer overflows (CSOs), it has not fulfilled its intended goal of virtually eliminating SSOs. (Plaintiffs' Sep. Appx. at 211.) Contrary to expectations, there have been an average of 4.9 SSOs and 3.0 CSOs annually since the Deep Tunnel went into effect (some of which were not related to the Deep Tunnel), resulting in discharges by MMSD totaling 936.7 million gallons and 12.3 billion gallons respectively since 1994 (as of a 2002 audit). *Id.* at 212.

The plaintiffs grew concerned about these continuing discharges and the State's apparent lack of enforcement action. On July 11, 2001, they sent to MMSD the required notice of intent to bring a citizens' suit under the Clean Water Act for violations of MMSD's discharge permit that had occurred after the Deep Tunnel came on line, with copies to all necessary state and federal agencies. (Plaintiffs' Sep. Appx. at 105-09.) Five days later, the State notified MMSD that several of the SSOs identified in the plaintiffs' letter were violations of MMSD's WPDES permit and the Act. One day prior to the expiration of the 60-day notice period prescribed by the Act, the State and MMSD filed a stipulation (2001 Stipulation) with the Dane County Circuit Court as part of the 1976 litigation. Neither the plaintiffs nor the public were provided any opportunity to comment on the 2001 Stipulation prior to its filing. The 2001 Stipulation required MMSD, at an estimated total cost of $ 907 million, to complete three new deep tunnel projects (increasing storage capacity by an additional 116 million gallons, or 30%), to complete all activities contemplated by the approved 2010 Facilities Plan by various fixed dates, to complete planning for the 2020 Facilities Plan by a fixed date and to complete and implement a Capacity, Management, Operation and Maintenance

(CMOM) self-auditing program.[3] (MMSD's Br. at 13.) However, the Dane County judge refused to approve the 2001 Stipulation, saying, "It does seem to me that at some point a court's involvement in a case must end. It also seems to me that this case has gone well beyond that point." (Plaintiffs' Short Appx. at 9.[4])

Subsequently, the State and MMSD agreed to meet with the plaintiffs to discuss their concerns about the proposed 2001 Stipulation. The State agreed, at the plaintiffs' request, to hold off filing suit against MMSD until March 15, 2002, while settlement negotiations took place. (MMSD's Br. at 14.) However, the agreement failed to include a provision that the State be allowed to file first on that date. After the negotiations failed, the plaintiffs filed their suit at 7:57 a.m. on March 15, 2002 in the Eastern District of Wisconsin, alleging 165 SSOs from various locations during the period from January 1, 1995 to September 25, 2001. Later that same day, the State filed suit in Milwaukee County Circuit Court, counting the same 165 SSOs as 13 SSO events in accordance with the terms of MMSD's permit and finding eight of the 13 to be violations of MMSD's permit and three to require additional investigation. (MMSD's Br. at 15 n.6; PSA at 7.) The plaintiffs, under Wisconsin law, could have requested to intervene in the State's suit but did not do so. *Wis. Stat.* § 803.09.

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[3] MMSD notes that the Environmental Protection Agency acknowledges that "even municipal collection systems operated in an exemplary fashion may experience unauthorized discharges under exceptional circumstances." (MMSD's Br. at 10 n.4.) Also, the EPA recently advocated reduction or elimination of penalties for municipalities that adopted the CMOM program. *Id.* However, the Milwaukee Journal Sentinel recently reported that a top EPA official characterized MMSD as "the worst dumper on Lake Michigan and among the worst on the Great Lakes." Schultze and Rohde, *supra* note 2, at lB.

[4] For ease of reference, citations to the Plaintiffs' Short Appendix will be designated by "PSA at __."

On May 29, 2002, while the plaintiffs' suit was pending, the Milwaukee County Circuit Court, at the request of the State and MMSD, entered a stipulation (2002 Stipulation) that settled the State's lawsuit. The 2002 Stipulation was "substantially the same" as the 2001 Stipulation: although the compliance schedule had been compressed, the scope of the work remained the same. (MMSD's Br. at 16.) The plaintiffs have several problems with the 2002 Stipulation, the main problem apparently being the lack of any penalties for past violations or provisions for penalties in the event of future violations, though other flaws are mentioned. (*See, e.g.*, Plaintiffs' Br. at 13-14, 32; MMSD's Supp. Appx. at 87-95.) The 2002 Stipulation, like the 2001 Stipulation, requires MMSD to undertake various improvement projects which will cost taxpayers $ 907,000 through 2010. It also rescinded the 2001 Stipulation that the State and MMSD had previously filed.

Shortly thereafter, MMSD moved to dismiss the plaintiffs' complaint. An Audit Report subsequently released by the Wisconsin Legislative Audit Bureau (2002 Audit Report) (Plaintiffs' Sep. Appx. at 205-301) highlighted several factors contributing to MMSD's continuing CSOs and SSOs, including large storms in recent years; capacity issues in the Deep Tunnel and MMSD's sewers and treatment facilities; and operational policies that have exacerbated overflows. *Id.* at 231. But the district court nonetheless found that the State had commenced and diligently prosecuted judicial and administrative actions against MMSD, resulting in a lack of subject matter jurisdiction that barred the plaintiffs' citizens suit from proceeding. In the alternative, the district court found that *res judicata* would bar the litigation. The plaintiffs now appeal both of these findings.

## II. Discussion

The plaintiffs brought this suit seeking a declaratory judgment, injunctive relief, civil penalties and costs and fees

under the citizens' suit provision of the Clean Water Act. The district court had federal question jurisdiction pursuant to § 505(a) of the Act. 33 U.S.C. § 1365(a); 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291 because the district court entered a final judgment dismissing this case due to a lack of subject matter jurisdiction.

We review de novo the district court's dismissal of the plaintiffs' suit for lack of subject matter jurisdiction. *Transit Express, Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001). In considering a motion to dismiss for lack of subject matter jurisdiction, we must accept the complaint's well-pleaded factual allegations as true and must draw all reasonable inferences from those allegations in plaintiffs' favor as the non-moving party. *Id.* We also employ the de novo standard in reviewing the dismissal of an action on res judicata grounds. *4901 Corp. v. Town of Cicero*, 220 F.3d 522, 527 (7th Cir. 1999).

The Clean Water Act provides that "any citizen may commence a civil action on his own behalf-(1) against any person . . . who is alleged to be in violation of (A) an effluent standard or limitation under this [Act]." 33 U.S.C. § 1365(a). Pursuant to the Act, no action may be brought "prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order." *Id.* at § 1365(b)(1)(A). Citizens are also barred from bringing suit "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." *Id.* at § 1365(b)(1)(B). In addition, any violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to" the subsection of the Act addressing administrative actions "shall not be the subject of a civil penalty action." 33 U.S.C.

§ 1319(g)(6)(A). However, this limitation is inapplicable to a citizens' suit that is filed before the State commences administrative action. *Id.* at § 1319(g)(6)(B).

Here, the plaintiffs gave the required written notice to MMSD, to the United States Environmental Protection Agency (United States EPA) and to the State of its intent to sue, and the plaintiffs' complaint was filed more than 60 days after notice was given. Whether the State had "commenced and [was] diligently prosecuting a civil...action" or administrative action at the time the plaintiffs filed suit, and if not, whether res judicata nonetheless bars the plaintiffs' suit, are the issues we must resolve.

**A. Did WisDNR timely commence and diligently prosecute a civil or administrative action?**

In determining whether the plaintiffs' suit was barred under § 1365(b)(1)(B), the district court discussed three of the State's judicial actions: the 1977 Stipulation (which arose out of the 1976 litigation and addressed earlier violations); the 2001 Stipulation (which was filed as an attempted continuation of the 1976 litigation to address the violations alleged by the plaintiffs but was not accepted by the Dane County court and was later rescinded by the 2002 Stipulation); and the 2002 Stipulation (which ended litigation that had been filed in Milwaukee County court later on the same day that the plaintiffs filed suit in district court). The district court also examined whether administrative actions undertaken by the State barred the plaintiffs' suit for civil penalties under § 1319(g). We will consider in turn each of these four hurdles facing the plaintiffs.

**1. The 1976 litigation and 1977 Stipulation**

No one disputes (or could dispute) that the 1976 litigation in Dane County and the resulting 1977 Stipulation occurred or were commenced before the plaintiffs' suit was filed

nearly 25 years later. However, whether these actions also qualify as a diligent prosecution of violations that occurred after all work contemplated under the 1977 Stipulation had been completed is another matter. The plaintiffs argue that the 1977 Stipulation was over and done with by 1996 at the latest. But even if we assume that the 1976 action were still "open" to receive the filing of the 2001 Stipulation, the 1977 Stipulation could not qualify as a diligent prosecution of the violations alleged by the plaintiffs since the projects mandated by the 1977 Stipulation obviously did not prevent those violations from occurring.

Whether the 1976 litigation and 1977 Stipulation constituted a diligent prosecution of the historical violations that had occurred prior to the 1976 litigation and the contemplated violations that were going to continue to occur until work was completed under the 1977 Stipulation is not at issue here. Logically, however, the 1976 litigation and 1977 Stipulation cannot constitute diligent prosecution of violations that have occurred (or continued to occur) after all work under the 1977 Stipulation had been completed. If the violations alleged by the plaintiffs occurred because of lingering problems that the 1977 Stipulation failed to resolve, the 1977 Stipulation cannot have been a diligent prosecution of the circumstances causing those violations. If, on the other hand, the violations alleged by the plaintiffs occurred because of circumstances unrelated to those that the 1977 Stipulation was intended to comprehensively address, then the 1976 action cannot possibly have been a diligent prosecution of violations due to circumstances unknown and unlitigated at that time. Either way, the 1976 litigation and 1977 Stipulation do not amount to diligent prosecution of the violations alleged by the plaintiffs.

**2. The 2001 Stipulation**

The 2001 Stipulation was filed as part of the 1976 litigation in Dane County Circuit Court *before* the 60-day notice period had expired and *before* the plaintiffs filed their suit. But the

Dane County judge refused to enter the 2001 Stipulation, and the parties later rescinded it by the 2002 Stipulation, which was entered as part of a separate action instituted in Milwaukee County Circuit Court. The district court concluded that the Dane County court had retained jurisdiction over the 1977 Stipulation and that the 2001 Stipulation was a diligently prosecuted continuation of the same action. The plaintiffs argue that the Dane County court lacked continuing jurisdiction because all work contemplated under the 1977 Stipulation was long completed and that the flaws in the 2001 Stipulation render it non-diligent.

With respect to the timeliness of the action, if the State had chosen to file a brand new *lawsuit* rather than a new consent order in a very old lawsuit, that lawsuit would have been timely commenced. And if the Dane County judge had approved the 2001 Stipulation after it was filed, the 2001 Stipulation would also have been a timely commenced judicial enforcement action. The fact that the 2001 Stipulation was never approved by the court and was later rescinded does not affect its *timeliness,* which is determined by the date of filing.[5] *Connecticut Fund for the Environment, Inc. v.*

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[5] For the purposes of deciding whether the 2001 Stipulation was a timely commenced action, under circumstances such as these, we are reluctant to use the initiation of an older judicial action to back-date the commencement of an action under the Clean Water Act as suggested by MMSD. (MMSD's Br. at 27-28.) If a state agency were allowed to indefinitely continue an enforcement action so as to ensure that it always has on the back burner a court action that has been "commenced" before any later citizens' suit could be filed, that arrangement would eviscerate the timely commencement requirement because the agency could wait as long as it liked before responding to any citizens' suit. Using the earlier commencement date might also indicate a lack of diligence in resolving problems known about for years. *See New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. 162, 168 (S.D.N.Y. 1991) (finding that prosecution was not diligent where orders were amended to extend deadlines and a target completion date of 1995 was "simply too long to rectify a problem that has been known about

*Upjohn Co.*, 660 F. Supp. 1397, 1404 (D. Conn. 1987) ("The court must apply an inflexible rule which determines jurisdiction from the time of filing the complaint."). But the court's non-approval *does* render the 2001 action a non-diligent prosecution.[6] Even though the 2001 Stipulation may have been *intended* to address "dry and wet weather overflows, and mandate[] three extensions to the Deep Tunnel" (PSA at 19), the fact that the Dane County judge refused to enter the 2001 Stipulation (whether on a jurisdictional basis or otherwise) robbed that Stipulation of any legally binding effect. Even if the 2001 Stipulation had bound the parties, it was rescinded a few months later by the 2002 Stipulation, which resolved a separate judicial action filed in a different court. The fact that the 2002 Stipulation was very similar to the 2001 Stipulation does not equip the 2001 Stipulation with the teeth required to qualify on its own as a diligent prosecution. A judicial action that never resulted in any legally binding agreement to resolve the violations alleged by the plaintiffs (and was rescinded before MMSD took any actions toward complying with it) is not a diligent prosecution.

**3. The 2002 litigation and 2002 Stipulation**

The plaintiffs argue that a timely commenced action must be filed prior to a citizens' suit in order for it to have potentially preclusive effect under the Act. Since the plaintiffs filed their suit several hours before the state's suit was filed, they argue that the State's 2002 litigation was not timely commenced. MMSD counters that the State agreed to postpone filing its complaint until March 15, 2002 at the plaintiffs' request, in order to give the parties a chance to

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since 1983"). Here, the 2001 Stipulation was filed before the 60-day window expired or a citizens' suit was filed and was therefore timely.

[6] It is also troubling that the 2001 Stipulation was filed without opportunity for notice and comment by the public, including the plaintiffs.

negotiate a satisfactory resolution. The parties did not incorporate into their agreement to postpone filing their lawsuits any provision governing which party would be considered to have filed first. The district court did not weigh in on this issue, finding that the State's 2002 suit was filed several hours after the plaintiffs' suit, and apparently concluding that it could not qualify as a timely commenced judicial action. (PSA at 21.)

We are relieved to note that races to the courthouse to file Clean Water Act complaints, such as the one which took place here, are rare, though the caselaw relating to such situations is correspondingly sparse. When there has been an agreement between the parties that the citizens would file first, the citizens' suit has been held not to be barred by a suit filed by the state agency later the same day. *Chesapeake Bay Found. v. Am. Recovery Co.*, 769 F.2d 207, 207-08 (4th Cir. 1985). Similarly, where the state agency had asked the citizens to postpone filing their suit, the earlier-filed citizens' suit was not barred. *Long Island Soundkeeper Fund, Inc. v. New York City Dep't of Envtl. Prot.*, 27 F. Supp. 2d 380, 382-83 (E.D.N.Y. 1998). MMSD argues that these cases are inapposite here because the State postponed filing its suit at the plaintiffs' request and not the other way around. However, these decisions (and others) arrived at their holdings by employing a literal, inflexible interpretation compelled by the clear and unambiguous language of the Act. *See Chesapeake Bay Found.*, 769 F.2d at 208 ('This latter statutory bar is an exception to the jurisdiction granted in subsection (a) of § 1365 and jurisdiction is normally determined as of the time of the filing of a complaint. Moreover, the verb tenses used in subsection (b)(1)(B) and the scheme of the statute demonstrate that the bar was not intended to apply unless the government files suit first (and is diligently prosecuting such suit)."); *Long Island Soundkeeper Fund*, 27 F. Supp. 2d at 383 ("The language of this statute 'clearly contemplates action prior to the filing of a citizen suit.'") (internal citation

omitted); *Connecticut Fund for the Env't*, 660 F. Supp. at 1404 ("The court must apply an inflexible rule which determines jurisdiction from the time of filing the complaint."). We are not inclined to add our encouragement to a race to the courthouse. Nor do we wish to discourage state agencies from attempting to resolve disputes through negotiation with citizens' groups. But the clear and unambiguous language of § 1365(b)(1)(B) and its uniform interpretation by the courts on a jurisdictional point dictate a conclusion that the State's 2002 litigation (and resulting 2002 Stipulation) cannot qualify as a timely commenced action barring the plaintiffs' suit.[7]

Any similarity of the 2002 Stipulation to an ineffective stipulation that was timely filed in a different suit in a different court (i.e., the 2001 Stipulation) does not alter the outcome. Thus, we find that the State's judicial action resulting in the 2002 Stipulation was commenced when the Milwaukee County suit was filed after the plaintiffs' suit was filed on March 15, 2002, not when the 2001 Stipulation was filed (or earlier). Any other conclusion would allow state agencies to file "placeholder" lawsuits or consent decrees to ensure timely commencement and then to grapple with the problem at their (relative) leisure, subject only to the diligent prosecution requirement (which, as the district court noted, is a deferential standard). Since the Milwaukee County action does not meet the timely commencement requirement, it cannot bar the plaintiffs' citizens' suit under § 1365(b)(1)(B), whether it is diligent or not. We will address the question whether the 2002 Stipulation represents a diligent prosecution of the violations alleged by the plaintiffs later, in our discussion of res judicata.

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[7] We note that the State could have avoided this outcome by incorporating a "first to file" provision into its agreement with the plaintiffs to postpone filing any suit until March 15, 2002.

**4. WisDNR's administrative actions**

As the Eleventh Circuit has recently noted,

> [c]ourts that have addressed § 1319(g)(6)(A)(ii)—the "diligent-prosecution bar"—have interpreted the statute to bar citizen suits when three requirements are satisfied. First, the state must have "commenced" an enforcement procedure against the polluter. Second, the state must be "diligently prosecuting" the enforcement proceedings. Finally, the state's statutory enforcement scheme must be "comparable" to the federal scheme promulgated in 33 U.S.C. § 1319(g).

*McAbee v. City of Fort Payne*, 318 F.3d 1248, 1251 (11th Cir. 2003). In finding that the State's administrative enforcement actions barred the plaintiffs' suit under § 1319(g), the district court here referred to such actions as meetings between the EPA and WisDNR, between WisDNR and MMSD and between all three entities (PSA at 5, 6); information requests by WisDNR that MMSD had to comply with (PSA at 6); projects outlined by WisDNR for MMSD to "focus on initially" (PSA at 7); investigation of overflow events between February and July 2001 (*id.*); the issuance of an informal notice of non-compliance to MMSD shortly after the plaintiffs' notice of intent to sue was received *(id.; see also* Plaintiffs' Br. at 33-34 (noting that until the State filed its suit on March 15, 2002, it had never escalated its "stepped" enforcement policy beyond the first level, which is the issuance of an informal notice of non-compliance)); meetings between MMSD and WisDNR in August 2001 "to negotiate a corrective action plan" (PSA at 8); and the "formal referral of the matter" to WisDOJ, which subsequently filed the 2001 Stipulation in Dane County court (PSA at 8-9). Although these actions undeniably resulted in the eventual filing of the Milwaukee County action and the 2002 Stipulation, they

do not themselves qualify as the commencement of an administrative enforcement action that would serve to bar the plaintiffs' suit.

"Commencement" with respect to an administrative action is not defined by the Act, and we have not previously had the opportunity to weigh in on this issue. Other courts have found that the filing of an administrative consent order prior to the filing of a citizens' suit would in most cases qualify as the sort of administrative action that would bar a citizens' suit for civil penalties.[8] But if the consent order comes after the citizens' suit is filed, the citizens' suit may proceed. *See Altamaha Riverkeepers v. City of Cochran 162* F. Supp. 2d 1368, 1373 (M.D. Ga. 2001) (finding that proposed consent order and fines that came after citizens' suit was filed did not bar suit). The Eighth Circuit has implied that issuance of a formal Notice of Violation could also qualify as the commencement of an administrative enforcement action if it triggers notice and hearing procedures designed to protect and give access to the public and interested parties. *Cf. Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 379-80. Letters and conferences where no public notice was given and that did not result in hearings have been found not to bar a citizens' suit. *See Tobyhanna Conservation Ass'n v. Country Place Waste Treatment Co.*, 734 F. Supp. 667, 669-70 (M.D. Pa. 1989) (finding state environmental department's unsigned

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[8] *See McAbee*, 318 F.3d at 1251 n.6 ("[M]ost courts that have addressed the issue have concluded that issuance of an administrative consent order . . . would satisfy the 'commencement' requirement."); *Arkansas Wildlife Fed'n v. ICI Ams.*, 29 F.3d 376, 380 (8th Cir. 1994) (concluding that filing administrative consent order counted as "commencement' because interested third parties had right to intervene and certain notice and hearing procedures became available); *Public Interest Research Group, Inc. v. Elf Atochem N. Am., Inc.*, 817 F. Supp. 1164, 1173 (D.N.J. 1993) ("Order and Notice, issued pursuant to state regulations specifically providing for due process protections in the initiation of enforcement proceedings, was the actual initiation or 'commencement' of an enforcement proceeding").

letter to alleged water discharge permit violator setting administrative conference for which no public notice was provided and at which no hearing was held did not bar citizens' suit); *cf. PMC, Inc. v. Sherwin-Williams Co.*, 151 F.3d 610, 618-19 (7th Cir. 1998) (noting in context of the bar Resource Conservation and Recovery Act (RCRA) places on citizens' suits when judicial action has been commenced, that "writing a letter would hardly be described as 'commencing' or 'prosecuting' an 'action' . . . , especially when we consider the interminable character of much administrative process and the difficulty of deciding on a threshold below which the process is too tentative to justify barring a citizen's suit") (citations omitted).

Discerning from these various decisions the contours of the law, we conclude that with respect to administrative enforcement actions, the "commencement" of the action is tied in with the "comparability" of the state statute to the federal provisions. Specifically, we hold that for the purposes of § 1319(g), an administrative action "commences" at the point when notice and public participation protections become available to the public and interested parties. Because Wisconsin law does not authorize administrative penalty proceedings or fines, there are no administrative enforcement provisions "comparable" to those of the Clean Water Act. Rather, when WisDNR decides that a violation requires enforcement, Wisconsin law provides that WisDNR "shall refer the matter to [WisDOJ] for enforcement," and WisDOJ "shall initiate the legal action requested by" WisDNR. *Wis. Stat.* § 283.89(1)-(2). MMSD admits that Wisconsin's permissive intervention statute is triggered only when the administrative enforcement advances to the stage at which a legal action is filed. (MMSD's Br. at 39.) Thus, in Wisconsin, the "formal moment" at which an action is commenced is when WisDOJ files a complaint with state or federal court because "from this formal moment enforcement

becomes public." *Wisconsin Envtl. Law Advocates v. Wisconsin Power & Light Co.*, 03-C-0739-S, at 17 (W.D. Wis. May 3, 2004).

We conclude that the non-judicial actions taken by the State did not commence an administrative action barring the plaintiffs' suit under § 1319(g), because at no point prior to the filing of the Milwaukee County suit did the state's administrative enforcement procedures contemplate public notice and participation. Although the filing of the 2001 Stipulation was a judicial action, there was no opportunity provided for public notice or participation. Moreover, as we noted earlier, the 2001 Stipulation was not a diligently prosecuted action because it was not legally binding and was withdrawn by the 2002 Stipulation. And the Milwaukee County action was filed too late. Because the State did not timely "commence" and diligently prosecute an administrative enforcement action, the plaintiffs' suit for civil penalties is not barred by § 1319(g). And, as we have already concluded, the plaintiffs' suit is not barred under § 1365(b)(1)(B) by any of the State's judicial enforcement actions.

**B. Res judicata**

The district court found that the 2002 Stipulation "is drafted to resolve all potential liability for the alleged sanitary sewer overflows occurring after 1994 and bring MMSD into compliance with the WPDES permit." (PSA at 24.) It went on to conclude that, in addition to being barred under the Act by prior actions taken by the State, the plaintiffs' suit would also be barred under res judicata. According to Wisconsin law,

> [u]nder the doctrine of claim preclusion, a subsequent action is barred when the following three factors are present: (1) identity between the parties or their privies in the prior and present suits; (2) prior litigation resulted in a final judgment on the merits by a court with

jurisdiction; and (3) identity of the causes of action in the two suits.

*Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 233-34, 601 N.W.2d 627 (Wis. 1999).

The plaintiffs do not challenge that the second element has been established. They do, however, challenge whether the plaintiffs' causes of action were the same as those brought by the State in the Milwaukee County action and whether MMSD has demonstrated that the State was in privity with the plaintiffs.

**1. Identity of causes of action**

Wisconsin takes a "transactional" approach to determining whether there is an identity of causes of action. *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). "What factual grouping constitutes a 'transaction,' and what groupings constitute a 'series,' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, [and] whether they form a convenient trial unit. . . ." *Id.* at 554.

The plaintiffs argue that their suit is broader and different in scope than the State's 2002 suit in Milwaukee County. The plaintiffs point to specific differences, including their allegations of violations from 165 locations (as opposed to on 8 occasions); a higher volume of unpermitted discharges (900 million gallons as opposed to 471 million gallons); dry weather discharges from sanitary sewers; MMSD's "consistent operational and management problems that have significantly contributed to the exceedingly high number and volume of unpermitted discharges" (Plaintiffs' Br. at 44); and additional violations, including one in August 2002 involving 412 million gallons of sewage that was not covered by the 2002 Stipulation (which resolved MMSD's liability for all

SSOs "to the latest date upon which either of the parties executes this agreement" *(id.* at 45)).

All of the plaintiffs' purported pre-Stipulation differences are swallowed up by the 2002 Stipulation's broad scope. The 2002 Stipulation was intended to "present[] a comprehensive solution to sanitary sewer overflows, regardless of their cause, including but not limited to wet weather events, equipment malfunctions, and operator error." (Plaintiffs' Sep. Appx. at 178-79.) It purported to relieve MMSD from liability for *all* violations up to the date the 2002 Stipulation was executed, including those that were not specifically alleged in the State's complaint. Thus, there is an undeniable identity of causes of action with respect to the pre-Stipulation violations.

As for post-Stipulation violations, there are two reasons why the unspecified ongoing or continuing violations alleged in the plaintiffs' complaint do not constitute a separate and distinct cause of action. First, the Act itself bars the bringing of any action "prior to sixty days after the plaintiff *has given notice of the alleged violation"* to various parties. 33 U.S.C. § 1365(b)(1)(A) (emphasis added). This notice must contain "sufficient information to permit the recipient to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, [and] the date or dates of such violation." 40 C.F.R. § 135.3(a). As the Supreme Court has noted, the purpose of this notice is twofold: it "allows Government agencies to take responsibility for enforcing environmental regulations, thus obviating the need for citizen suits," and it "gives the alleged violator 'an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit.'" *Hallstrom v. Tillamook County*, 493 U.S. 20, 29, 107 L. Ed. 2d 237, 110 S. Ct. 304 (1989) (internal citation omitted). Even if the

unspecified violations, such as the August 2002 violation, were sufficiently well-pleaded by references to "ongoing or continuing" violations, they were not mentioned in the required notice and would therefore be barred by the Act, at least as part of this particular suit.

The second reason why the unspecified post-Stipulation violations are not separate and distinct causes of action is that the 2002 Stipulation was intended to address the underlying causes of the continuing violations by implementing remedial measures some of which, due to their large scale, will take several years to complete. The State was unquestionably aware that violations would continue while the projects mandated by the 2002 Stipulation are being implemented. Even though the 2002 Stipulation does not release MMSD from liability for post-Stipulation violations, those post-Stipulation violations are clearly related in origin to the pre-Stipulation violations and have the same factual basis. Thus, the August 2002 violation (and other post-Stipulation violations) not specifically mentioned in the 2002 Stipulation are not separate and distinct causes of action, and the element of res judicata requiring an identity of causes of action is met here.

**2. Privity of the parties**

We agree with the district court that a person not a party to a previous action can be said to be in privity with an "official or agency invested by law with authority to represent the person's interests." Restatement (Second) of Judgments § 41(1)(d). Thus, "even when an agency enforcement action is not commenced until after the citizen suit, final judgment in the agency's court action will be a res judicata or collateral estoppel bar to the earlier citizen suit." *Comfort Lake Ass'n v. Dresel Contracting*, 138 F.3d 351, 356 (8th Cir. 1998). This, however, presumes that the agency was acting in its *parens patriae* role as a representative of the public. As a representative of the public's interests, the State is subject to the

exceptions enumerated in section 42 of the Restatement (Second) of Judgments, including the following: "A person is not bound by a judgment for or against a party who purports to represent him if...the representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent." Restatement (Second) of Judgments § 42(1)(e). Thus, in order for the state agency to be in privity with the public's interests, the state's subsequently-filed government action must be a diligent prosecution. And if the subsequently-filed government action is a diligent prosecution, "the fact that . . . any . . . private attorney general is barred from duplicating that effort should hardly seem surprising or harsh."[9] *Hudson River Fishermen's Ass'n v. County of Westchester*, 686 F. Supp. 1044, 1052 (S.D.N.Y. 1988), *quoted in United States EPA v. Green Forest*, 921 F.2d 1394, 1405 (8th Cir. 1990). So the question becomes whether the State's action was diligent.

We look to the language of the Act to find out what is meant by "diligent prosecution." Citizens' suits are barred "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State *to require compliance with the standard, limitation, or order."* 33 U.S.C. § 1365(b)(1)(B) (emphasis added). Thus, if the judicial action is "capable of requiring compliance" with the Act and is "calculated to do so," the

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[9] We decline to adopt the plaintiffs' argument that "in a situation where a citizen suit has been filed prior to the State's commencement of an enforcement action, the privity element of res judicata can never be satisfied." (Plaintiffs' Br. at 40.) *See Atlantic States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127 (2d Cir. 1991) ("However, we do not believe the Clean Water Act can or should be read to discourage a governmental enforcement action once a citizen suit has been commenced nor to prevent state or local authorities from achieving a settlement as to conduct that is the subject of a citizen complaint. To hold otherwise would likely lead to underenforcement of the Clean Water Act.").

citizens' suit will be barred. Jeffrey G. Miller, "Overlooked Issues in the 'Diligent Prosecution' Citizen Suit Preclusion," *10* Wid. L. Symp. J. 63, 84, 85 (2003). Notwithstanding these considerations, diligence does not require a state agency to have perfect foresight. As we have previously held in the context of the RCRA, which has a materially similar diligent prosecution requirement, "[t]he statute does not require that the [State] succeed; it requires only that the [State] try, diligently." *Supporters to Oppose Pollution v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992).

The district court found that the 2002 litigation and Stipulation represented a diligent prosecution because the 2002 Stipulation was intended by the parties to present "a comprehensive solution to sanitary sewer overflows, regardless of their cause, including but not limited to wet weather events, equipment malfunctions, and operator error" (PSA at 22) and to "bring MMSD into compliance with the WPDES permit" *(id.* at 24). The 2002 Stipulation requires significant changes to MMSD's operating structure at considerable expense, including storage and conveyance capacity expansions and treatment plant and interceptor sewer upgrades. MMSD was obligated to complete its sanitary sewer evaluation study and to require satellite municipalities to reduce inflow and infiltration by 5% by the end of 2002. MMSD was additionally required to implement a CMOM plan by June 30, 2007, which is intended to help reduce (with the goal of eliminating) all non-permitted SSOs. (Plaintiffs' Sep. Appx. at 184.)

We recognize that diligence on the part of the State is presumed. *See, e.g., Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986) ("[T]he court must presume the diligence of the state's prosecution of a defendant absent persuasive evidence that the state has engaged in a pattern of conduct that could be considered dilatory, collusive, or otherwise in bad faith.").

We surmise that this presumption is due not only to the intended role of the State as the primary enforcer of the Clean Water Act, *see Gwaltney of Smithfield, Inc. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 60, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987), but also to the fact that courts are not in the business of designing, constructing or maintaining sewage treatment systems. *See North & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 557 (1st Cir. 1991). Yet, we think a diligent prosecution analysis requires more than mere acceptance at face value of the potentially self-serving statements of a state agency and the violator with whom it settled regarding their intent with respect to the effect of the settlement. Our diligent prosecution analysis of the 2002 Stipulation will examine whether it is capable of requiring compliance with the Act and is in good faith calculated to do so. *See* Miller, *supra*, 10 Wid. L. Symp. J. at 84, 85.

The plaintiffs raise several concerns about the diligence of the 2002 Stipulation that can be easily dispensed with, and one which we think has merit. All are nonetheless worth discussing. First, the plaintiffs argue the 2002 Stipulation is not a diligent prosecution because it does not include a provision expressly requiring compliance with MMSD's WPDES permit and the Act. MMSD rejoins that, it is not necessary to include language requiring compliance because the Act and Wisconsin's permitting statute themselves require compliance, and the 2002 Stipulation does not relieve MMSD from its obligation to comply. The State is not prevented from bringing enforcement actions if post-Stipulation violations occur. Moreover, MMSD points out that adding compliance language would not bring about compliance absent treatment of the underlying causes of the violations. *See Clean Air Council v. Sunoco, Inc.*, 2003 U.S. Dist. LEXIS 5346, at *15-*16 (D. Del. 2003) (rejecting a plaintiff's contention that the state's consent order should have included language requiring compliance and focusing the diligent prosecution inquiry on the actions required to eliminate the cause of the violations).

We agree that the focus of the diligent prosecution inquiry should be on whether the actions are calculated to eliminate the cause(s) of the violations. Since MMSD was not relieved from complying with the Act and its permit, the addition of compliance language in the present circumstances is unnecessary and would not bring about compliance any faster or more efficiently.

The plaintiffs also argue that the 2002 Stipulation gives MMSD until 2010 to complete construction of certain sewer improvements which are not guaranteed to result in compliance with the Act. MMSD points out that the deadlines are necessary "because of the actual amount of time it takes to plan, solicit bids, and construct public works of this magnitude." (MMSD's Br. at 25.) The deference we owe to the State's actions comes into play in determining whether these deadlines are too lengthy to be diligent: as we have said, we are not in the business of constructing sewage facilities. We conclude that the construction deadlines incorporated in the 2002 Stipulation are not so lengthy as to indicate a lack of diligence. "Merely because the State may not be taking the precise action Appellant wants it to or moving with the alacrity Appellant desires does not entitle Appellant to injunctive relief." *Scituate*, 949 F.2d at 558, *quoted in Supporters to Oppose Pollution*, 973 F.2d at 1324.

The plaintiffs also allege that the 2002 Stipulation does not address the violations that are due to operational failures and mismanagement, though the only specific MMSD policy the plaintiffs have pointed out as mismanagement is the policy of reserving a certain amount of Deep Tunnel capacity to handle wet-weather SSOs, resulting in larger-than-necessary CSOs.[10]

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[10] This policy was first mentioned by the plaintiffs at oral argument when discussing MMSD's "mismanagement." Prior to that, the plaintiffs had never specified which operational or management problems were causing violations.

Specifically, after a July 1999 storm that resulted in a 62.2 million gallon SSO, MMSD increased the volume of capacity it reserves in the Deep Tunnel to accommodate sanitary sewage, from 40 million gallons to 200 million gallons. (PSA at 241.) Although this policy has reduced the volume of SSOs, it did so by allowing CSOs instead, even at times when the Deep Tunnel was not filled to capacity. *(Id.)* The 2002 Audit Report estimated that the volume of CSOs between 1994 and July 2002 would have been reduced by 656 million gallons if unused capacity had not been kept in reserve. (PSA at 242.) But the solution to this problem requires accurate prediction of weather patterns and storm intensity. MMSD's current automated system lacks the sophistication to permit precise predictions of sewage flow, and this, combined with the well-known inaccuracies of weather forecasts, means that discharge decisions are frequently made with incomplete information. (PSA at 243.) MMSD is, however, installing a $ 3.3 million Real Time Control System that provides updated information on system performance every 15 minutes or less, which should help MMSD maximize existing system capacity during heavy storms. (PSA at 298.) We also note that the CSOs caused by MMSD's reservation of Deep Tunnel capacity to handle sanitary sewage were not violations of the Act or of MMSD's permit. Though we question the permitting decision that has created the incentive for MMSD to avoid violations by shifting its discharges from SSOs to larger-than-necessary CSOs during heavy storms, we cannot say that MMSD's reserve capacity policy is not in compliance with the Act or its permit."[11]

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[11] "Mechanical failures have also caused some SSOs, but they represent less than half of one percent of the total volume discharged from sanitary sewers from 1994-2002. *Id.* at 234. MMSD confirmed at oral argument that its dry weather SSOs were caused by equipment malfunction.

Although the reasons contributing to MMSD's recent massive and distressing discharges of sewage indicate that MMSD may not have put all of its operational and management difficulties behind it, the plaintiffs' vague allegations that the 2002 Stipulation fails to address MMSD's operational and management difficulties are insufficient to indicate that MMSD will thereby be prevented from complying with the Act after work mandated by the 2002 Stipulation is completed. If any additional operational or management problems have become evident since the 2002 Stipulation,[12] the State and MMSD are entitled by the Act to an opportunity to resolve them before the plaintiffs may jump into the fray.

The last of the easily-disposed-of arguments is that the 2002 Stipulation imposes no penalties for past violations, nor does it include stipulated penalties for future violations. Basically, the plaintiffs seem to want us to announce a rule that diligence requires penalties. With respect to the lack of

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[12] *See, e.g.*, Resler, *The Sound of Lame Excuses,* MILWAUKEE J. SENTINEL, May 20, 2004, at 22A ("Officials of the Milwaukee Metropolitan Sewerage District said this week that for an 18-hour period in the middle of last weekend's massive dumping of raw sewage, only one of the three giant pumps critical to the operation of the district's controversial deep tunnel system was actually working. As storms drenched the area, that left just one pump to transfer millions of gallons of sewage from the deep tunnel, where it is stored, to the district's two treatment plants."); *id.* ("[A] construction project—the replacement of two huge galvanized steel holding tanks on Jones Island—effectively reduced capacity at the district's two treatment plants. Critics have wondered why the tanks are being replaced now during the rainy season, a legitimate point."); Steve Schultze and Marie Rohde, *Equipment Glitches Still Plague MMSD,* MILWAUKEE J. SENTINEL, June 17, 2004, at 1A ("MMSD officials [agreed] that yet another project—replacement of giant sewage holding tanks—also probably contributed to the overflows, but only slightly. . . . Only one or two of the three giant tunnel pumps were used during the May rains and dumping because the holding tanks are under construction and several months past their projected completion date.").

penalties for pre-Stipulation violations, MMSD argues that under *Gwaltney* and the First Circuit's interpretation of it in *North & South Rivers Watershed Ass'n v. Town of Scituate*, the government may choose to forego civil penalties in favor of securing expensive capital improvements. Given that the focus of our inquiry is on whether the State's actions are going to bring about compliance, the presence or absence (or, for that matter, the size) of penalties does little, on its own, to shed light on the diligent prosecution inquiry. It is true that compliance may be coerced by penalties if they are sufficiently high to deter the violations. *See* Miller, *supra*, 10 Wid. L. Symp. J. at 86. In order to have a deterrent effect, the penalty must be high enough that the violator would find it less expensive to take whatever actions are necessary to comply than to continue violating. This is why courts have considered whether penalties are assessed and whether the amount of the penalty has taken into account the economic benefit the violator derived from non-compliance. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 890 F. Supp. 470, 489-95 (D.S.C. 1995), *vacated on other grounds*, 149 F.3d 303 (4th Cir. 1998), *rev'd on other grounds*, 528 U.S. 167, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000).

But penalties are by no means a *requirement* for compliance to be assured. Repeated violations due to the same underlying systemic causes are likely to continue until a large-scale remedial project addressing those underlying causes is completed (assuming the large-scale project will successfully and permanently abate the conditions causing the violation). And large-scale remedial projects, as we have earlier noted, can take years. We agree with the First Circuit that "duplicative actions aimed at exacting financial penalties in the name of environmental protection at a time when remedial measures are well underway do not further [the goals of the Clean Water Act]. They are, in fact, impediments to environmental remedy efforts." *Scituate*, 949 F.2d at 556;

*see also* Peter A. Appel, "The Diligent Prosecution Bar to Citizen Suits: The Search for Adequate Representation," 10 Wid. L. Symp. J. 91, 101-02 (2003) (noting that allowing citizens' suits for penalties to proceed when expensive remedial action is required both hinders negotiated settlements and is unlikely to help the environment). Levying additional penalties on violators who are undertaking massive remedial projects will not bring about compliance any faster or cause the result to be any more effective--it will just cause the result to be more expensively arrived at.

As for the post-Stipulation violations, although it is true that there are no provisions for stipulated penalties in the 2002 Stipulation, MMSD points out that neither does it prevent the State from bringing subsequent enforcement actions for subsequent violations. The concern with diligent enforcement is *whether* violations are prosecuted, not *how* they are prosecuted. *See Clean Air Council*, 2003 U.S. Dist. LEXIS 5346, at *11-*12 (finding that stipulated penalties are just as diligent as seeking the same penalty in a separate enforcement action). If the State fails to diligently prosecute post-Stipulation violations, the plaintiffs may prod it into action, as they did here.

We do, however, share the plaintiffs' concern that the planned improvements to MMSD's system under the 2002 Stipulation may not in fact result in MMSD's eventual compliance with the Act and its permit. (*See* Plaintiffs' Br. at 30-31; Reply Br. at 6.) The 2002 Audit Report attributed MMSD's overflows to the magnitude of storms in recent years, as well as capacity issues in the Deep Tunnel and MMSD's sewers and treatment facilities. (PSA at 231.) During planning for the Deep Tunnel, the capacity requirements were estimated based on the largest storm previously recorded in the Milwaukee area, which occurred in June 1940. (PSA at 234.) However, from the time the Deep Tunnel came on line in 1994 through July 2002, there were

five storms larger than the June 1940 storm of record, resulting in discharges of 394.7 million gallons from sanitary sewers and over 4 billion gallons from combined sewers. (PSA at 235.) Not only has the Deep Tunnel been unable to handle storms larger than it was designed for, but it has also proved insufficient to capture wastewater from storms smaller than the storm of record on nine occasions, resulting in SSOs totaling approximately 528 million gallons. (PSA at 236.) The Deep Tunnel was also planned based on assumptions that infiltration and inflow from surrounding communities would be reduced by 12.5%; they have instead increased by 17.4%. (PSA at 237.) Sedimentation has further reduced available capacity in the Deep Tunnel by a small amount (2.1 million gallons). (PSA at 240.)[13]

We do not deny that increasing the storage and conveyance capacity in MMSD's system should reduce the number and volume of overflows. But MMSD itself admits that what the 2002 Stipulation accomplishes is the eventual *reduction* of overflows, not elimination of them. As MMSD pointed out to the plaintiffs, "[t]he Northwest Side Sewer Relief Project is intended to have sufficient capacity to capture most of the volume of events comparable to those experienced since the start up of the Inline Storage System....Reduction in *number of SSO events* is contemplated; not a *percent reduction in total volume of SSO's*." (MMSD's Supp. Appx. at 98; *see also* MMSD's Br. at 46 (noting that the State accomplished "guaranteed meaningful relief in the form of capital improvements and operational changes that will *actually reduce the number of overflow events*") (emphasis added).) Compliance means an *end* to violations, not merely a reduction in

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[13] A problem related to siphons in the sewer system is causing a significant amount of wastewater to be diverted into the Deep Tunnel rather than being treated immediately by the treatment plant (PSA at 239), but MMSD began a project in 2001 to improve the efficiency and capacity of these siphons, which is expected to be completed in 2007 (PSA at 299).

the number or size of them. That is why courts have considered whether the alleged diligent prosecution achieves a permanent solution or whether violations will continue notwithstanding the polluter's settlement with the government. *See Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127-28 (2d Cir. 1991); *New York Coastal Fishermen's Ass'n v. New York City Dep't of Sanitation,* 772 F. Supp. 162, 168 (S.D.N.Y. 1991).

Contrary to the district court's finding, we do not feel confident that the 2002 Stipulation will indeed result in elimination of the root causes underlying the large-scale violations alleged by the plaintiffs' regardless of the State's and MMSD's self-serving statements that it is intended to do so. We note the persistence of violations due to the same underlying causes even after the 1977 Stipulation was fully implemented (and despite a similar intention that the capacity-increasing projects would "eliminate dumping from sanitary sewers"[14]). We also note the perhaps overly cautious pace adopted by the State in evaluating the effectiveness of the remedial projects required by the 1977 Stipulation—it took eight years and a notice of intent to sue from the plaintiffs before the State took any actions that went beyond investigating and evaluating the violations that have persisted even after the Deep Tunnel came on line. While the projects mandated by the 1977 Stipulation may have been calculated in good faith to ensure MMSD's compliance, it should not have taken the State so long to arrive at the conclusion that the Deep Tunnel had been under-designed. These, along with MMSD's own admissions that the 2002 Stipulation is aimed at reducing, not eliminating, violations, are insufficient to indicate a diligent prosecution.[15]

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[14] Schultze and Rohde, *supra* note 2, at lB.

[15] Of course, we are aware that here, as with other regulatory circumstances, "efforts to achieve 'the last 10 percent'" would be very expen-

Under the circumstances of this case, we cannot say that simply throwing more money at the problems and taking an inordinately long time to determine if enough money was thrown at the problems to solve them this time around are actions calculated in good faith to bring about compliance with the Act. The record to date does not inspire confidence that effective and timely action will be taken to address problems of long standing. While the 2002 Stipulation will hopefully result in fewer and smaller violations after the mandated projects are completed, it is still, when all is said and done, a stalling tactic rather than a compliance strategy. As such, we cannot say that it is a diligent prosecution, and we cannot uphold the district court's determination that res judicata bars the plaintiffs' suit.[16]

## III. Conclusion

Because we cannot state with certainty on the basis of this record whether the 2002 Stipulation is calculated to result in compliance with the Act, we therefore remand for a determination of that issue. Specifically, the district court should determine whether the systemic inadequacies of MMSD's sewerage facilities will be sufficiently ameliorated by the

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sive. Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 28 (Harvard Univ. Press 1993). But we are not talking about whether the proposed remedial efforts will eliminate the last gallon of sanitary sewerage discharges in a 500-year storm; rather, we are concerned that the remedial projects may, after their completion, nonetheless turn out to be too little, too late.

[16] We therefore need not determine whether fairness would render res judicata inapplicable here. *See Froebel v. Meyer*, 217 F.3d 928, 935 (7th Cir. 2000) ("Wisconsin law does not treat res judicata as an ironclad rule which must be implacably applied whenever its literal requirements are met, regardless of any countervailing considerations.") (internal quotations omitted); *McCourt v. Algiers*, 4 Wis. 2d 607, 91 N.W.2d 194, 196 (Wis. 1958) (indicating that res judicata may not apply where relitigation is necessary to prevent unfairness).

proposed remedial projects to result in compliance. If the district court concludes, after giving some deference to the judgment of the State, that there is a realistic prospect that violations due to the same underlying causes purportedly addressed by the 2002 Stipulation will continue after the planned improvements are completed, the plaintiffs' suit may proceed. If, after a more detailed examination of the 2002 Stipulation, the district court concludes that no such prospect exists, it may so find, provide a thorough explanation of its conclusion and consider reinvocation of the res judicata bar. However, before reimposing a res judicata bar, the district court should determine whether Wisconsin's fairness exception to the res judicata doctrine should be applied here.[17]

Although we have allowed the plaintiffs' suit to continue (at least for the time being), we hope that the State, together with the parties in this matter, will take advantage of this opportunity to review the efficacy of the 2002 Stipulation in light of recent events and will be able to resolve their differences as well as the problems affecting MMSD's system. For the reasons stated above, the district court is REVERSED, and the suit is REMANDED for further proceedings in keeping with this opinion.

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[17] As Wisconsin's Supreme Court has noted, "claim preclusion may be disregarded in appropriate circumstances when the policies favoring preclusion of a second action are trumped by other significant policies. Claim preclusion . . . is a principle of public policy applied to render justice, not to deny it. Any exception to claim preclusion, however, must be limited to special circumstances or the exceptions will weaken the values of repose and reliance." *Sopha*, 230 Wis. 2d at 236.

**APPENDIX B**

UNITED STATES DISTRICT COURT,
E.D. WISCONSIN

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No. 02-C-0270

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FRIENDS OF MILWAUKEE'S RIVERS and
Lake Michigan Federation,
*Plaintiffs*,

v.

MILWAUKEE METROPOLITAN SEWAGE DISTRICT,
*Defendant*.

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Sept. 29, 2003.

*Karen Mala Schapiro*, Frazer Schapiro & Rich, Milwaukee, WI, *James A. Vroman*, *Katharine Saunders*, Stephen Safranski, *Steven M. Siros*, Jenner & Block, *Laurel O 'Sullivan*, Chicago, IL, for Plaintiffs.

*James M. Caragher*, Katherine E. Lazarski, *Linda E. Benfield*, Foley & Lardner LLP, Milwaukee, WI, for Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS, DENYING AS MOOT

DEFENDANT'S MOTION FOR PROTECTIVE ORDER STAYING DISCOVERY PENDING RESOLUTION OF MOTION TO DISMISS, AND DISMISSING CASE

CLEVERT, J.

This case is before the court on defendant Milwaukee Metropolitan Sewerage District's Motion to Dismiss. Plaintiffs, Friends of Milwaukee's Rivers ("FMR") and Lake

Michigan Federation ("LMF"), brought a citizen-suit under the Federal Water Pollution Control Act (the "Clean Water Act" or "CWA"), 33 U.S.C. §§ 1251, *et seq*. According to the Milwaukee Metropolitan Sewerage District ("MMSD"), the suit is barred because the state, under the oversight of the United States Environmental Protection Agency ("U.S.EPA"), has utilized both judicial and administrative enforcement mechanisms to diligently prosecute MMSD for CWA violations. 33 U.S.C. § 1319(g)(6)(A)(ii). After hearing oral argument and reviewing the submissions of the parties, the court agrees that this suit is barred and will grant defendant's motion to dismiss.

## FINDINGS OF FACT

MMSD is a state-chartered, special purpose government agency providing wastewater services for all or part of 28 municipalities in Southeast Wisconsin. The District's 420-square-mile service area includes all cities and villages (except the City of South Milwaukee), within Milwaukee County and all or part of 10 municipalities or sanitary districts in the surrounding counties of Ozaukee, Washington, Waukesha and Racine. (Aff. McCabe, ¶ 3)

Two types of municipality-owned sewer systems feed into MMSD's interceptor sewers. Many older sewer systems are considered "combined sewers" because the sewers are designed to carry storm water and sanitary sewage. Combined sewers are located in some parts of the City of Milwaukee and in parts of Shorewood. The remainders are "separate sewers" where storm water drains into a storm water sewer system that empties directly into area waterways. Water from sanitary sewers empties into the MMSD system and is carried to treatment plants. (Aff. McCabe, ¶ 5)

The current MMSD Wisconsin Pollution Discharge Elimination System (WPDES) Permit No. WI-0036820-1 allows six Combined Sewer Overflows (CSOs) each year.

The permit prohibits Sanitary Sewer Overflows (SSOs), except in limited situations, such as preventing loss of life or severe property damage. (Aff. McCabe ¶ 9, Ex. B)

To resolve the pending motion to dismiss, the relationship between the WDNR, U.S. EPA, and the MMSD over the past twenty-five years must be examined. In 1976, the Sewerage Commission of the City of Milwaukee (MMSD's predecessor organization) brought an action against the WDNR challenging treatment standards at municipal waste water facilities. *The Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of Milwaukee v. State of Wisconsin Department of Natural Resources,* Dane County Circuit Court Case No. 152-342. The WDNR responded by filing counterclaims against the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee, alleging sanitary sewer overflows (SSOs), combined sewer overflows (CSOs), and other practices in violation of the CWA and the District's Wisconsin Pollutant Discharge Elimination System Permit.

The Dane County Circuit Court action was resolved by a Stipulation and Judgment on May 25, 1977. The 1977 Stipulation and Judgment included a construction compliance schedule for projects to increase system capacity (including minimum annual expenditures for the construction projects), the requirement to eliminate dry weather bypassing from the system by July 1, 1982, the requirement that flows from separate sewer areas meet federal and state effluent requirements, and the obligation to correct wet weather bypassing from the combined sewer areas of the MMSD service area. In addition, the Stipulation and Judgment imposed a "waste load allocation system" which effected a moratorium on new sewer construction in certain communities. (Pl. Ex. A)

To comply with the requirements of the Dane County Stipulation and Judgment, the MMSD developed the 2001

Facility Plan. That Plan included projects for the construction of several large interceptor sewers, construction of an Inline Storage System (the "Deep Tunnel"), numerous improvements to two treatment plants and rebuilding a biosolids processing facility. Completion of these projects cost over $2.3 billion. (Aff. McCabe, ¶ 14) Ultimately, the Plan was approved by the WDNR and the U.S. EPA after public input.

Compliance with the stipulated schedule for the required capital improvements was monitored closely by the WDNR, through a process called the "Annual Schedule Establishment." Under the ASE process, a construction schedule was submitted each year by MMSD to the WDNR for its approval. If the WDNR agreed with MMSD's proposed schedule, it was entered as a court order in the Dane County Circuit Court. Each year, as required by the 1977 Stipulation, the MMSD reported to the WDNR on compliance with its construction schedule in a "Compliance Audit Report." The final ASE under the Stipulation governed construction during 1993, and the last significant project completed under the Stipulation was the Deep Tunnel. (Aff. McCabe, ¶ 15)

In September 1994, MMSD requested that the WDNR agree to dismiss the Dane County Circuit Court action, as all necessary construction was completed. The WDNR refused citing its need to have sufficient time to evaluate MMSD's compliance with the Stipulation. MMSD made similar requests for dismissal in 1995, 1996, and 1997. Nonetheless, the WDNR reiterated opposition to dismissal due to its ongoing assessment of MMSD's compliance with the stipulation and its desire to have access to the Dane County Court in the pending case should further enforcement action become necessary. (Aff. McCabe, ¶ 18, Ex. D; Aff. Lazarski ¶ 5, Ex. 1)

In 1996, MMSD began development of the 2010 Facilities Plan. The letters submitted by MMSD confirm that WDNR was involved in the planning process, and that the WDNR

approved the Facilities Plan on December 9, 1998, following public review and an opportunity for public comment. (Aff. McCabe, ¶ 20, Ex. E)

On January 6, 2000, the U.S. EPA and WDNR held the first of two meetings between the agencies to coordinate their enforcement efforts against MMSD. (Aff. Lazarski ¶¶ 6-7, Exs. 2 and 3) At the January 6, 2000, meeting, representatives from the two agencies discussed the importance of consistent enforcement actions nationwide, the importance of infiltration and inflow control by the local communities, the problem of using sanitary sewers to carry storm water, and the implementation of a Capacity, Management, Operation and Maintenance (CMOM) self-auditing program. (Aff. Lazarski, ¶ 6, Ex. 2) A second meeting held on May 24, 2000, addressed the complexities of the SSO problem and the need to address SSOs from the MMSD and the local communities with a single effort. Participants discussed various strategies and enforcement options, including imposition of civil penalties. (Aff. Lazarski ¶ 7, Ex. 3)

By letter dated June 16, 2000, the WDNR advised Anne Spray Kinney, the MMSD Executive Director, of the "Department 's ongoing review of [MMSD] bypass reports to determine compliance with Wisconsin Pollutant Discharge Elimination System (WPDES) permit conditions and applicable Wisconsin Administrative Codes." The letter advised MMSD that it would be required to meet with the WDNR and U.S. EPA on July 12, 2000, to "report on your progress to reduce bypassing and outline your strategies to work with communities to reduce flows and bypassing." (Aff.McCabe, ¶ 21, Ex. F) During this time, the U.S. EPA was developing a proposed rule incorporating the CMOM self-auditing program into the agency's nationwide enforcement strategy. (Aff. Lazarski ¶ 13, Ex. 9, pp. 86-149, 237-242)

Following the July 12, 2000, meeting, the WDNR informed MMSD that "[G]iven this background and the frequency and volume of overflows in the Milwaukee area during 1999 and 2000," the WDNR Secretary George Meyer would be presenting a report to the Natural Resources Board at their January 2001, meeting. (Aff. McCabe ¶ 23, Ex. G) To prepare the report for the Board meeting, the WDNR developed a series of questions for consideration focusing on five interrelated topics: Separated Basin Performance, Overflow History, Preventing Separated Sewer Overflows, Minimizing Combined Sewer Overflows, and the Inline Storage System Operations. (Aff. McCabe ¶ 11, Exs. G and H) Further, MMSD was required to attend a meeting on December 13, 2000, between U.S. EPA and the WDNR, and the WDNR provided MMSD with a request for information. By letter dated December 18, 2000, MMSD reported to the WDNR the schedule under which it would be able to compile the information requested. (Aff. McCabe, Ex. H)

On March 16, 2001, the WDNR Secretary Darrell Bazzell transmitted to MMSD a copy of the Department's Report entitled "Sewer Overflows in Wisconsin--A Report to the Natural Resources Board." (Aff. McCabe, Exs. I and J) Two weeks later, the WDNR advised MMSD that a "series of near-term and long-term recommendations in the report" would require "additional work by, and interaction between, the District and the Department to assume the recommendations are fully implemented." (Aff. McCabe ¶ 26, Ex. K) The WDNR set forth five projects for MMSD to "focus on initially." (Aff. McCabe ¶ 26, Ex. K)/

Between February and July of 2001, the WDNR continued to investigate overflows to determine the compliance status of those events. (Aff. McCabe ¶ 27, Ex. L; Aff. Lazarski ¶ 8, Ex. 4) At the same time, MMSD responded to and clarified previous responses to requests for data. (Aff. McCabe ¶ 27, Ex. L)

On July 11, 2001, Attorney Shapiro, counsel for the Friends of the Milwaukee River (FMR) and Lake Michigan Federation (LMF), notified the Executive Director of MMSD of her intent to file a lawsuit against MMSD for violations of §§ 301 and 402 of the Clean Water Act, and MMSD's Wisconsin Pollutant Discharge Elimination System Permit. (Pl. Ex. C) The Notice of Intent to Sue (NIS) identified "at least thirteen occasions during which at least 165 SSO discharge locations within MMSD's jurisdiction discharged sanitary sewerage due to the 'deep tunnel' being filled to capacity." In addition, the NIS claimed that on "at least nine (9) occasions there were at least thirteen (13) SSO discharge locations that discharged sanitary sewerage because of insufficient conveyance capacity downstream from the sewerage discharge locations." (*Id.*)

Five days after the NIS letter, WDNR Secretary Bazzell notified MMSD that WDNR had determined that after 1994, eight of thirteen SSO events associated with the Inline System were violations of the WPDES permit, and that two events were in compliance with permit requirements. Three other events were due to causes which needed to be determined. (Pl. Ex. D) Further, all four events associated with hydraulic capacity in the Metropolitan Interceptor Sewer were violations. (Aff. McCabe, Ex. M) Bazzell stated:

> I want you to know that we are very appreciative of all the work the MMSD has done to comply with the requirements of your Wisconsin Pollutant Discharge Elimination System Permit. We also appreciate the District's commitment to implementing its 2010 Plan. However, current information indicates that projects envisioned in that plan will not be sufficient in their own right to achieve full compliance with applicable permit requirements. Therefore, we feel there is additional work to be done and that a long-term corrective action

> plan must be developed and placed into a legally binding format.
>
> I have notified appropriate legislators and Natural Resources Board members of our decisions and have directed staff to work with you and U.S. Environmental Protection Agency staff to arrive at a legally binding, long term corrective action plan. The long term corrective action plan needs to be consistent with the recommendations made in "sewer Overflows in Wisconsin—A Report to the Natural Resources Board" (March 15, 2001).

(Aff. McCabe, Ex. M)

The MMSD denied that any of the separate sewer overflow events from the MMSD system constituted WPDES violations. (Aff. McCabe, Ex. N) By letter dated August 22, 2001, Secretary Bazzell responded that although the parties disagreed on the compliance status of the overflow events, they agreed that corrective action is required. Bazzell directed staff to meet with MMSD to "discuss developing a legally enforceable long-term corrective action plan." (Aff. McCabe, Ex. O)

MMSD and the WDNR met during August 2001 to negotiate a corrective action plan, and the WDNR made a formal referral of the matter to the Wisconsin Department of Justice. (Aff. McCabe ¶ 31) On September 7, 2001, the Wisconsin Department of Justice filed a Stipulation and Proposed Order incorporating the corrective action plan between the MMSD and the WDNR in Dane Count Circuit Case No. 152-342. The new Stipulation required MMSD to complete three major new sewer capacity expansion projects; to complete all facilities in the approved 2010 Facilities Plan by a fixed date; to complete the 2020 Facilities Planning by December 31 2007; to complete the infiltration and inflow reduction program by a fixed date; and to develop and

implement a Capacity, Management, Operation and Maintenance Program no later than December 31, 2007. The Stipulation required MMSD to report on the progress toward meeting the requirements of the Stipulation. The estimated cost of the activities in the Stipulation is $907 million. (Aff. McCabe, ¶ 32, Ex. P)

Also, on September 7, 2001, MMSD's Director of Legal Services sent a copy of the Stipulation to counsel for LMF and FMR, Attorney Karen M. Shapiro. (Aff. McCabe ¶ 33, Ex. Q) The letter states, in part, "[A]fter your clients review the Stipulation, I am sure they will agree that it more than meets their concerns." (*Id.*) On October 19, 2001, Judge Moria Krueger of the Dane County Circuit Court stated her reluctance to sign the Stipulation and Proposed Order in a case "a quarter of a century old." (Aff. McCabe ¶ 34, Ex. S) Judge Krueger wrote:

> From what has recently been presented, it looks as though further court "oversight" is contemplated for almost 20 more years. As is noted in the latest submission, judgment entered in this case in 1977. (There is also a 1976 judgment in the file). It does seem to me that at some point a court's involvement in a case must end. It also seems to me that this case has gone well beyond that point. Every encouragement is given to the parties to continue to resolve their disputes by written stipulation, but I do not understand why each agreement (contract) must convert to a court order in a 25 year old case. I also know of no case law mandating that I sign such on-going orders when presented to me, no matter how many years after judgment. If you know of such precedent, I would appreciate your sharing it with me.

Attorney Shapiro wrote to MMSD on October 10, 2001, acknowledging receipt of the Stipulation and requesting an opportunity to discuss the Stipulation with the MMSD and

WDNR. The parties agreed to meet on December 20, 2001. (Aff. McCabe, Ex. V) The U.S. EPA provided comments on the proposed Stipulation and Order to the WDNR in advance of the December 20, 2001, meeting. (Pl. Ex. L) The meeting was attended by representatives of MMSD, the Wisconsin Department of Justice, the DNR, U.S. EPA, and LMF and FMR and their attorneys. (Aff. McCabe, Ex. W) As a follow up to the meeting, Attorney Shapiro wrote the following letter to MMSD and Assistant Attorney General Eric J. Callisto:

> Thank you for meeting with Friends of Milwaukee's Rivers ("FMR") and Lake Michigan Federation ("LMF") on Thursday, December 20, 2001, to discuss the above-referenced stipulation.
>
> I am writing to confirm our understanding of what was agreed to in terms of next steps. Specifically, by January 11, 2002, Eric Callisto will inform LMF/FMR whether or not the Wisconsin Department of Justice ("DOJ") can formally commit to defer from filing a complaint or complaint and stipulation against MMSD until March 15, 2002, at the earliest. If the DOJ can make such a commitment, LMF and FMR will likewise agree not to file suit before March 15, 2002.
>
> LMF and FMR will provide DNR, DOJ and MMSD with written comments concerning the Stipulation by January 31, 2002. The parties also agreed to schedule a second meeting to discuss the stipulation and DNR's, MMSD's and DOJ's response to the LMF/FMR comments. The meeting is currently set for 10:30 a.m. on February 19, 2002, at MMSD's offices.

Assistant Attorney General Eric J. Callisto agreed that the Wisconsin Department of Justice would not file a complaint or complaint and stipulation against the Milwaukee Metropolitan Sewerage District prior to March 15, 2002. (Aff. McCabe, Ex. X) A letter from the U.S. EPA to the WDNR

dated January 8, 2002, states that the U.S. EPA supports the WDNR taking the lead in negotiating a resolution to the MMSD's CSOs and SSOs problems, and that the CWA requirements would be satisfied if the EPA comments were incorporated into the Stipulation. (Aff. Lazarski ¶ 10, Ex. 6) Attorney Shapiro provided the comments on the stipulation to the Wisconsin Department of Justice and MMSD on January 31, 2002, and a second meeting was held on February 19, 2002. (Aff. McCabe, Ex. Y)

Prior to the February 19, 2002, meeting, Attorney Shapiro acknowledged MMSD's offer to make additional files available to LMF and FMR for their review. (Aff. McCabe, Ex. Y) In addition, Attorney Shapiro wrote to McCabe and Callisto on March 7, 2002, supplementing a settlement proposal with a request for attorney's fees and costs in the amount of $110,000. (Aff. McCabe, Ex. Y)

On March 15, 2002, at 7:57 a.m., plaintiffs filed this suit. Later that day, the Wisconsin Department of Justice filed an action against MMSD in Milwaukee County Circuit Court. The Milwaukee County suit alleged eight violations of MMSD's WPDES permit based upon sanitary sewer overflow events on August 27, 1995, June 16, 1996, April 8, 1999, April 21, 1999, June 12, 1999, May 17, 2000, August 5, 2000, and September 11, 2000. The complaint sought forfeitures as provided in Wis. Stat. § 283.91(2), a 23% penalty assessment pursuant to Wis. Stat. 757.05(1), a 10% environmental assessment pursuant to Wis. Stat. § 299.93(1), a 1% jail assessment pursuant to Wis. Stat. § 302.46(1), court costs and disbursements, including attorney fees, as well as injunctive relief. (Pl. Ex. N; Aff. McCabe, Ex. Z)

The EPA provided additional comments on the Stipulation to the WDNR on April 4, 2002. (Aff. Lazarski ¶ 11, Ex. 7) On May 17, 2002, the DOJ filed a revised Stipulation and Proposed Order resolving the state's claims against MMSD. (Aff. McCabe, Ex. AA) The Stipulation and Order was signed

by Milwaukee County Circuit Court Judge Mel Flanagan on May 29, 2002. The Final Stipulation states:

> . . . in lieu of a penalty assessment or other monetary sanction, the establishment of a legally binding long-term corrective action program for future water pollution abatement construction projects . . . is consistent with the missions of both agencies to meet the requirements of the Federal and State Clean Water Acts, including the elimination of sanitary sewer overflows and the further reduction of combined sewer overflows, and to redress alleged sanitary sewer overflow violations of the District's WPDES permit; . . .

(Aff. McCabe ¶ 41, Ex. AA, p. 2)

Compliance with this Stipulation will increase the MMSD system's storage capacity by 116 million gallons (approximately 30%) and will force MMSD to implement the CMOM self-auditing program. The total cost of compliance with this Stipulation is estimated at approximately $907 million dollars.

On the federal level, the U.S. EPA filed a ten-page request for information with the MMSD under Section 308 of the Clean Water Act, 22 U.S.C. § 1318(a) in November of 2001. The request focused on MMSD's system operation, capacity and overflow history. The MMSD responded to this request with four cartons of information on February 14, 2002. (Aff. McCabe ¶ 36, Exs. T and U) In addition, a letter dated August 1, 2002, to Congressman Jan Schakowsky of Chicago, Illinois, from Christine Whitman, Chief U.S. EPA, explains the U.S. EPA's role in supervising the CSOs and SSOs that have occurred in Milwaukee:

> The United States Environmental Protection Agency (EPA) has been working with the Wisconsin Department of Natural Resources (the Department) and other concerned parties on the issues of CSO and SSOs for

> several years, and has been taking an active role in these matters. Prior to the State's filing of the stipulation and order against MMSD addressing SSOs, we participated in discussions with the Department, MMSD, and Environmental groups to develop a strategy to address the overflow problems. EPA is committed to working with the State on reissuance of its National Pollutant Discharge Elimination System (NPDES) permit to MMSD, which will include a long-term control plan to address the CSO problems. EPA supports the State's decision to issue individual NPDES permits to the MMSD service communities. The permits will include a commitment to control inflow and infiltration, which contribute to MMSD's overflows.

Attached to the letter is a fact sheet detailing "the positive steps that the Department, MMSD, and EPA, have taken toward correcting the difficult problem of wet weather overflows." (Supp. Aff. Lazarski ¶ 4, Ex. C) The fact sheet explains that the U.S. EPA Region 5 has issued information requests to three MMSD service communities and one to MMSD. "The purpose of the requests is to obtain the latest technical information so that U.S. EPA can make an informed decision on permitting and, if necessary, enforcement." Continuing, the fact sheet states that the EPA strategy to date has been to follow the State lead on the issue while maintaining a federal presence. (*Id.*)

In their submissions, plaintiffs have included several articles from the Milwaukee Journal Sentinel covering the MMSD and sewage dumping by MMSD after the 2002 Stipulation and Order was signed by Milwaukee County Circuit Judge Flanagan. (Pl. Exs. P, Pl. Ex. To Sur-Reply, A-E)

## CONCLUSIONS OF LAW

### A. Standard on a Motion to Dismiss

The standard of review for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction depends upon the purpose of the motion. 2 James Wm. Moore et al., Moore's Federal Practice, ¶ 12.30[4] (3d ed. 2003). If the motion simply challenges the sufficiency of the allegations of subject matter jurisdiction, "the court must accept as true all well-pleaded factual allegations and draw reasonable inferences in favor of the plaintiff." *Transit Exp., Inc. v. Ettinger*, 246 F.3d 1018, 1023 (7th Cir. 2001) (citing *Rueth v. EPA*, 13 F.3d 227, 229 (7th Cir. 1993)). If, however, the motion denies or controverts the truth of the jurisdictional allegations, it is permissible for the court to "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Capitol Leasing Co. v. F.D.I.C.*, 999 F.2d 188, 191 (7th Cir. 1993).

### B. Subject Matter Jurisdiction

Plaintiffs assert that this court has subject matter jurisdiction over their claims pursuant to § 505(a) of the CWA. Under § 505(a), a suit to enforce any limitation in an NPDES permit may be brought by any "citizen," defined as "a person or persons having an interest which is or may be adversely affected." 33 U.S.C. §§ 1365(a), (g). Sixty days before initiating a citizen suit, however, plaintiffs must give notice of the alleged violation to the EPA, the State in which the alleged violation occurred, and the alleged violator. § 1365(b)(1)(A). The Act bars citizens from suing if the EPA or the State has already commenced, and is "diligently prosecuting," a civil or criminal action. 33 U.S.C. § 1365 (b)(1)(B); 33 U.S.C. § 1319(g)(6).

In cases such as this, deference to governmental enforcement agencies is appropriate because the CWA delegates

primary enforcement responsibility to designated state and federal agencies. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 890 F.Supp. 470, 487 (D.S.C.1995). For example, the requirement in section 505(b)(1)(A) that citizens file a notice letter sixty days before bringing a private enforcement suit was designed to give the governmental agencies the "first shot" at enforcement. *Id.* As the Supreme Court explained, "the citizen suit is meant to supplement rather than to supplant governmental action." *Id.*, (quoting Gwaltney *of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 61, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987)). Such limitations on citizen suits "allow for smoother operation of ordinary enforcement mechanisms" and encourage out-of-court settlements between agencies and polluters. *Id.*, (citing *Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co.*, 777 F.Supp. 173, 179, 186 (D.Conn. 1991), *aff 'd in part, rev'd in part*, 989 F.2d 1305 (2d Cir. 1993); *cf. Supporters To Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1324 (7th Cir. 1992) (action under the Resource Conservation and Recovery Act (RCRA), stating: "An Administrator unable to make concessions is unable to obtain them. A private plaintiff waiting in the wings then is the captain of the litigation. . . . To say . . . that the EPA is not 'diligently prosecuting' the action if it does not sue the person, or use the theories, the plaintiff prefers would strip EPA of the control the statute provides.").

MMSD argues that dismissal is appropriate under two sections of the CWA. The first is 33 U.S.C. § 1365(b)(1)(B), which provides that no action may be commenced "if the Administrator [of the EPA] or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order." MMSD submits that the State, under the oversight of the U.S. EPA, has commenced and prosecuted judicial enforcement actions diligently in Dane County and Milwaukee County Circuit Courts. The second is

33 U.S.C. § 1319(g)(6), which provides in relevant part, that any violation "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection, . . . shall not be the subject of a civil penalty action under . . . section 1365 of this title."

Under either limitation, plaintiffs bear the burden of proving that the state agency's prosecution was not diligent. *Williams Pipe Line Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997). This burden is heavy because diligence on the part of the enforcement agency is presumed. *See Connecticut Fund For Environment v. Contract Plating Co., Inc.*, 631 F.Supp. 1291, 1293 (D.Conn.1986). As several courts have recognized, "the state [enforcement] agency must be given great deference to proceed in a manner it considers in the best interests of all parties involved." *Arkansas Wildlife Fed'n v. ICI Americas Inc.*, 842 F. Supp. 1140, 1147 (E.D. Ark.1993), *aff'd,* 29 F.3d 376 (8th Cir. 1994), *cert. denied*, 513 U.S. 1147, 115 S.Ct. 1094, 130 L.Ed.2d 1062 (1995).

With respect to the first limitation on citizen suits, MMSD argues that the WDNR has maintained an open judicial action against MMSD since 1976 in Dane County Circuit Court, and more recently in Milwaukee County Circuit Court. From 1977 through 1994, the WDNR required the submission of and court approval for annual compliance reports and construction schedules. The WDNR refused to dismiss the 1976 Dane County action notwithstanding repeated requests by the MMSD in 1994, 1995, 1996, and 1997. Throughout 2000 and 2001, the WDNR investigated overflows from the MMSD system and concluded they were permit violations requiring a "legally binding corrective action plan." The WDNR referred the matter to the Wisconsin Department of Justice which filed the corrective action plan, in the form of a Stipulation and Order, with the Dane County Circuit Court in 2001. The Stipulation and Order addressed post-1994 SSO

events, and was revised following U.S. EPA and citizen comment. After the Wisconsin Department of Justice filed a judicial enforcement action in Milwaukee County Circuit Court on March 15, 2002, the revised Stipulation was approved on May 29, 2002. Plaintiffs had the opportunity to intervene in the Dane County and Milwaukee County actions, but failed to do so. Wis. Stat. § 803.09.

Not surprisingly, plaintiffs have a different view of the facts. They claim that the 1977 and 2002 Stipulations were "sweetheart deals," and that the WDNR filed its only judicial enforcement action in Milwaukee County Circuit Court after plaintiffs issued their NIS and filed this lawsuit. According to plaintiffs, the March 15, 2002, complaint filed in Milwaukee County Circuit Court and the 2002 Stipulation procedurally and substantively fall short of "diligent" prosecution.

Plaintiffs first take issue with the timing and manner in which the Milwaukee County action and the Stipulation were filed. They clarify that the WDNR did not commence the 1976 action, but rather filed a counterclaim in the action commenced by MMSD's predecessor. Therefore, the Milwaukee County action is the only enforcement action "commenced" by the WDNR and Wisconsin Department of Justice.

Next, plaintiffs note that the WDNR returned to the Dane County Circuit Court nearly twenty-five years later seeking the entry of a "new" stipulation. The new stipulation was filed just one business day before the expiration of the sixty-day tolling period initiated by the LMF and FMR's NIS. LMF and FMR were not invited to comment on the Stipulation until after it was filed with the Dane County Circuit Court. Finally, Wisconsin Department of Justice filed the enforcement action in Milwaukee County Circuit Court after plaintiffs filed their citizen suit with this court.

A closer look at the documents on file undermines plaintiffs' arguments. The 1977 Stipulation and Order filed in Dane County Circuit Court was drafted to address the "bypass and overflow discharges" and expresses the parties intent to "settle the above entitled action by agreeing to a program of pollution abatement projects to be carried out in the District." (Pl. Ex. A, p. 3) Paragraph 11 of the Stipulation provides that the "Judgment entered pursuant to this Stipulation shall remain in full force and effect until all the terms and conditions of the Judgment have been fulfilled, or until otherwise modified by the Court." Clearly, the parties and the court contemplated ongoing supervision. Stipulations were entered as orders in 1982, 1984, 1985, 1986 (March and December), 1987, 1989 (May and December), 1991, 1992, and 1994 with Dane County Circuit Judge Moira Krueger entering 1991, 1992, and 1993 orders. (Supp. Aff. McCabe, Exs. A-K) Moreover, the 1977 Stipulation refers to dollar equivalents in 1996.

It is equally clear that the parties viewed the 2001 Stipulation as a continuation of the 1976 enforcement proceedings. The 2001 Stipulation refers to the May 25, 1977, Stipulation, as well as the 1982-1983, 1984, 1986, 1987, 1987, 1991, 1992, and 1993, orders. It seeks to enforce violations of the same CWA discharge permit consistently reissued since 1977.[1] (Supp. Aff. McCabe, Ex. L, ¶ 23, Ex. M, pp. 51-52) Like the 1977 Stipulation, the 2001 Stipulation addresses dry and wet weather overflows, and mandates three extensions of the Deep Tunnel.

That the parties viewed the court as retaining jurisdiction is underscored by the WDNR's repeated refusal to dismiss the case in 1994, 1995, 1996, and 1997. Each time that MMSD requested dismissal, the WDNR opposed the request citing

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[1] The permit was renewed in 1974, 1978, 1983, 1989, 1997, and 2003. (Supp. Aff. McCabe, ¶ 13)

the need for sufficient time to evaluate MMSD's compliance. For example, a September 20, 1994, letter from the WDNR to a Senior MMSD Staff Attorney mentioned four reasons for the WDNR's refusal to dismiss the Dane County action simply because the Inline System was operational. (Aff. Lazarski, ¶ 5, Ex. 1) In addition, a January 7, 1997, letter from the WDNR to a Senior MMSD Staff Attorney, explained that "if the water quality standards are not being met, then provisions of the Stipulation would still be relevant." (Aff. McCabe, Ex. D)

To the extent that plaintiffs place great reliance on the attempt to file the 2001 Stipulation at the end of the sixty-day period, the record reveals that the WDNR investigated overflows that occurred from the MMSD system during 2000 and 2001 to determine if the events were in compliance with MMSD's WPDES permit. (Aff. McCabe, ¶¶ 21 -28) These events proceeded plaintiffs' NIS. When WDNR concluded that certain overflow events were permit violations, it notified MMSD that a "legally binding corrective action plan" would be required and negotiated the plan. The WDNR referred the matter to the Wisconsin Department of Justice, which submitted the corrective action plan, the Stipulation and the Proposed Order, to the Dane County Circuit Court on September 7, 2001. MMSD provided plaintiffs with a copy of the Stipulation and notified them of the submission in the Dane County Court case.

Of note is that on October 19, 2001, Dane County Circuit Judge Krueger sent a letter to the parties indicating her reluctance to keep a file open another twenty years as contemplated by the 2001 Stipulation. However, Judge Krueger did not disapprove the Stipulation, and was willing to store the Stipulation with the file. Significantly, she made no finding that the court lacked subject matter jurisdiction or authority to enter additional orders. Rather, she felt that it was time "for the case to be over." (Aff. McCabe, Ex. S)

Soon thereafter, the Wisconsin Department of Justice planned to file the Stipulation in Milwaukee County Circuit Court. Plaintiffs admit that the parties *mutually agreed* not to file any action until March 15, 2002, to allow plaintiffs time for comment on the Stipulation. A December 28, 2001, letter from plaintiffs ' attorney Karen Shapiro to Assistant Attorney General Eric J. Callisto and Attorney Michael J. McCabe states: "I am writing to confirm our understanding of what was agreed to in terms of next steps. Specifically, by January 11, 2002, Eric Callisto will inform LMF/FMR whether or not the Wisconsin Department of Justice ('DOJ') can formally commit to defer from filing a complaint or complaint and stipulation against MMSD until March 15, 2002, at the earliest. If DOJ can make such a commitment, LMF and FMR will likewise agree not to file suit before March 15, 2002." (Aff. McCabe, Ex. X) By letter dated January 9, 2002, Callisto confirmed that the Wisconsin Department of Justice would not file suit prior to March 15, 2002. (*Id.*) In the interim, plaintiffs submitted their comments as did the U.S. EPA, and the record indicates that the comments were considered. Nevertheless, plaintiffs filed the pending action in the Eastern District of Wisconsin on 7:57 a.m. of March 15, 2002. Although plaintiffs' filing preceded the WDNR's filing in Milwaukee County Circuit Court by several hours, it did not precede the administrative and judicial action taken in Dane County Circuit Court.

With respect to plaintiffs' substantive challenges to the Final Stipulation, they claim that, like its 1977 predecessor, the Final Stipulation does not require MMSD to comply with the CWA.[2] The Final Stipulation provides the District with a

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[2] The 2002 Stipulation filed in Milwaukee County Circuit Court rescinds the Stipulation dated September 7, 2001, filed in the Dane County case of *Sewerage Commission of the City of Milwaukee, et al. v. State of Wisconsin, et al.*, Case No. 152-342. (Aff. McCabe, Ex. Z, ¶ 16) It

grace period until 2010 to complete construction of certain sewer improvements, but does not require MMSD to assure WDNR or the general public that such actions will result in compliance with the CWA. The Final Stipulation imposes no penalties for past violations or stipulated penalties for future violations of the CWA or the Final Stipulation. Further, the March 15, 2002, Complaint and the Final Stipulation fail to address all of the allegations in plaintiffs' Amended Complaint.

These arguments fail as well. The Final Stipulation need not address each allegation in the plaintiffs' Complaint and Amended Complaint as long as it is based upon identical violations. *See Connecticut Fund for the Env't*, 631 F.Supp. at 1293 ("A federal court ought not to allow a citizens' suit to proceed merely because a prior pending state suit has not alleged as many separate violations of the Act as has the citizens' suit. . . . ") The Final Stipulation expresses the "intent of the parties" to present "a comprehensive solution to sanitary sewer overflows, regardless of their cause, including but not limited to wet weather events, equipment malfunctions, and operator error. This Stipulation therefore resolves the District's potential liability for all alleged sanitary sewer overflows to the latest date upon which either of the parties executes this agreement." (Aff. McCabe, Ex. Z, p. 2)

The Final Stipulation requires significant changes to MMSD's current operating structure at considerable expense. MMSD must complete construction of a 7.4 mile, 20 foot diameter relief sewer on the northwest side of Milwaukee to add 89 million gallons of storage capacity by December 31, 2006, construct two additional sewers adding 27 million gallons of conveyance capacity by December 31, 2009, and complete over 100 treatment plant and interceptor sewer

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further provides that "[a]ll other stipulations previously entered as orders in Dane County Case No. 152-342 continue in full force and effect." (*Id.*)

upgrade projects. In addition, MMSD is obligated to finalize its sanitary sewer evaluation study and to require satellite municipalities to achieve a 5% reduction of infiltration and inflow by December 31, 2002. The Final Stipulation addresses the overflow related deficiencies identified in the Legislative Audit Bureau Report.

Because the court concludes that the WDNR, under the oversight of the U.S. EPA, has diligently prosecuted MMSD through administrative efforts and a judicial enforcement action, there is no need to address defendant's remaining arguments. In any event, the court finds persuasive defendant's contention that this lawsuit is subject to dismissal under the doctrine of res judicata because plaintiffs' claims were settled in the Final Stipulation entered by the Milwaukee County Circuit Court. Under Wisconsin law "the doctrine of claim preclusion, or res judicata, provides that a 'final judgment on the merits bars parties from relitigating any claim that arises out of the same relevant facts, transactions or occurrences.'" *See Remer v. Burlington Area Sch. Dist.*, 205 F.3d 990, 998-999 (7th Cir. 2000). Wisconsin courts impose three prerequisites for claim preclusion: "(1) an' identity between the parties or their privies in the prior and present suits'; (2) the 'prior litigation resulted in a final judgment on the merits by a court with jurisdiction'; and (3) an 'identity of the causes of action in the two suits.'" *Remer*, 205 F.3d at 999.

Courts have held that, in situations such as this, the citizens' action provision of the CWA casts the citizen in the role of a private attorney general, thereby satisfying the privity requirement. *U.S. EPA v. City of Green Forest, Ark.*, 921 F.2d 1394, 1403 (8th Cir.1990); *see also Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1131 n. 5 (11th Cir.1990). In addition, Milwaukee County Circuit Court Judge Mel Flanagan signed the Final Stipulation and Order on May 29, 2002. The Order provides that the Final

Stipulation is approved, made part of the record, and made binding upon the parties. (Aff. McCabe, Ex. AA) The Final Stipulation is drafted to resolve all potential liability for the alleged sanitary sewer overflows occurring after 1994 and bring MMSD into compliance with the WPDES permit. (*Id.*) Therefore, the Final Stipulation and Judge Flanagan's May 2002, Order address the same subject matter as plaintiffs' Amended Complaint, which alleges SSO violations beginning January 1, 1995, and seeks an injunction requiring MMSD "to take all action necessary to meet the requirements of its WPDES permit and Clean Water Act with respect to SSOs." (Doc. # 5) It follows, that res judicata bars further litigation of the issues raised in the Amended Complaint.

Lastly, the court is mindful that plaintiffs had requested additional time to conduct discovery. However, this case has been pending well over one year. During that time, the court denied MMSD's motion for protective order staying discovery pending resolution of the motion to dismiss. The motion for additional time indicated that plaintiffs requested depositions of WDNR employees, and had been granted access to WDNR files. Further, the Supplemental Affidavit of Katherine E. Lazarski indicates that plaintiffs were provided access to MMSD files and made formal requests of the WDNR under the Wisconsin Freedom of Information Act. Plaintiffs sought from the WDNR all documents from the years 1994-2001 relating to discharges from the MMSD's SSO to surface waters, discharge monitoring reports, and separate sewer overflow quarterly monitoring reports for the Jones Island and South Shore Wastewater Treatment Plants of MMSD, and sampling results for fecal coliform and coliform bacteria relating to releases from MMSD's SSO's and sampling results for fecal coliform and coliform bacteria from groundwater monitoring wells identified in MMSD's discharge permit. (Aff. Lazarski ¶ 7, Ex. F) Plaintiffs have not asserted that they were denied any of those materials or have

they identified any information that they would seek if further discovery were allowed.

Now, therefore,

IT IS ORDERED that the defendant's motion to dismiss is GRANTED.

IT IS FURTHER ORDERED that defendant's motion for protective order staying discovery pending resolution of motion to dismiss is DENIED as moot.

IT IS FURTHER ORDERED that this case is DISMISSED with prejudice.]

Dated at Milwaukee, Wisconsin, this 29th day of September, 2003.

By the Court

/s/ C. N. Clevert, Jr.
U.S. District Court

**APPENDIX C**

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

[Filed Mar 03, 2004]

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Case No. 02-CV-270

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FRIENDS OF MILWAUKEE'S RIVERS
LAKE MICHIGAN FEDERATION,
*Plaintiffs*,

vs.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
*Defendant*.

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ORAL DISPOSITION
TRANSCRIPT OF HEARING
BEFORE THE HONORABLE CHARLES N. CLEVERT,
UNITED STATES DISTRICT JUDGE
Milwaukee, Wisconsin
September 29, 2003
10:45 a.m.

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REPORTED BY:

JOHN SCHINDHELM, RMR. CRR,
Federal Official Court Reporter
United States District Courthouse
517 East Wisconsin Avenue, Rm. 236
Milwaukee, Wisconsin 53202
Chambers: (414) 297-4167

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

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ALSO PRESENT:

MICHAEL MCCABE, MMSD Director of Legal Services

DENNIS GRZEZINSKI, Chairman of MMSD

PROCEEDINGS

THE CLERK: Case number 2002-C-270, *Friends of Milwaukee Rivers v. Milwaukee Metropolitan Sewerage District*. This matter is before the court for oral disposition. May we have the appearance, please?

MR. VROMAN: Good morning, Your Honor, Jim Vroman on behalf of Plaintiff Lake Michigan Federation.

MS. SCHAPIRO: Karen Schapiro on behalf of Friends of Milwaukee River and Lake Michigan Federation.

MS. O'SULLIVAN: Laurel O'Sullivan on behalf of Lake Michigan Federation.

MR. CARAGHER: Good morning, Your Honor, James Caragher and Linda Benfield from Foley & Lardner, Michael McCabe who is MMSD's Director of Legal Services, and Dennis Grzezinski the Chairman of MMSD, all in behalf of the Defendant Milwaukee Metropolitan Sewerage District.

THE COURT: Good morning to everyone. I do apologize for the delay in getting started this morning. I was on a hearing involving a person complaining that they had failed to receive necessary medical treatment for hepatitis C and are incarcerated. We had at least six or seven people on various telephones and it was difficult to hear and slow-going. As a consequence we were not able to start on time.

In any event I would like to apprise you where I believe this case must go.

First of all, I looked at all of the submissions of the parties and took into consideration the last set of documents that I asked you to file so that I could best analyze the posture of the proceedings in Dane County that were filed in 1976.

As a consequence of that I've come to the conclusion that the DNR, Wisconsin Department of Natural Resources, under the oversight of the United States Department of—U.S.



Environmental Protection Agency, has diligently prosecuted MMSD through administrative efforts and judicial enforcement action.

Moreover, as a result of the proceedings that were brought by the state in the Milwaukee County Circuit Court resulting in the final stipulation and settlement which was approved by Judge Mel Flanagan, this court is of the view that the doctrine of claim preclusion or res judicata would preclude further prosecution of this action. And so, it is the conclusion of this court that this case must be dismissed.

This has not been an easy case to resolve; however, the court is mindful that this case resulted from a race to the courthouse after the parties had engaged in certain discussions and had assured each other that no action would be filed I believe before March 15. This case was initiated only hours before the Milwaukee Circuit Court action.

I'm also mindful that the plaintiffs in this action had the opportunity to intervene in Milwaukee County and to be heard fully. That there may be issues that they would have addressed or treated differently is of no consequence now.

In addition, it is clear that during the course of proceedings in Dane County, and notwithstanding the age of that case, the State and MMSD treated the Dane County case as an open case. Multiple stipulations were reached and the court was contacted multiple times over the years for the purpose of entering various orders.

In particular, I'm mindful of Judge Krueger's letter which gave rise to the Milwaukee action. Judge Krueger did not say the Dane County court lacked jurisdiction. Indeed, the essence of her letter was there comes a time when a case must close. That in and of itself is not enough to conclude that the Dane County case was not an active prosecution of MMSD, or that the issues that give rise to this action were not being addressed and/or prosecuted vigorously.

The court will therefore issue its final written decision as soon as it can be completed. Hopefully that will be no later than tomorrow.

Are there any questions regarding what I've said?

MR. VROMAN: Not from plaintiffs, Your Honor.

MR. CARAGHER: No, Your Honor.

THE COURT: Again, I apologize for my delay this morning, but it was unavoidable.

With that we stand in recess.

(Hearing concluded at 10:52.)

* * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

I, JOHN T. SCHINDHELM, RMR, CRR, Official Court Reporter for the United States District Court, Eastern District of Wisconsin, do hereby certify that I reported the foregoing proceedings had on September 29, 2003, and that the same is true and correct in accordance with my original machine shorthand notes taken at said time and place.

/s/ John T. Schindhelm
JOHN T. SCHINDHELM
Official Court Reporter
United States District Court

Dated this 8th day of October, 2003 Milwaukee, Wisconsin.

## APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed October 1, 2004]

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03-3809

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FRIENDS OF MILWAUKEE'S RIVERS and
LAKE MICHIGAN FEDERATION,
*Plaintiffs-Appellants*,

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
*Defendant-Appellee*.

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### OPINION

JUDGES: Before Hon. RICHARD D. CUDAHY, *Circuit Judge*, Hon. ILANA DIAMOND ROVNER, *Circuit Judge*, Hon. DIANE P. WOOD, *Circuit Judge*.

### ORDER

On consideration of the petition of Defendant-Appellee for rehearing with suggestion for rehearing *en banc* filed September 16, 2004, in the above-captioned case, all of the judges on the panel voted to deny a rehearing, and no member of the court has voted to hear this case *en banc*.

Therefore, the petition for rehearing with suggestion for rehearing *en banc* is DENIED.

Additionally, the opinion rendered in this case is hereby amended to reflect the following minor addition: In footnote 1, the portion of the second sentence that reads "the dumping of 'an unprecedented 4.6 *billion* gallons of raw sewage' directly into Lake Michigan" shall be changed to read "the

dumping of 'an unprecedented 4.6 *billion* gallons of raw sewage' (more precisely, rainwater laced with raw sewage) directly into Lake Michigan." (Slip Op. At 3 n.1.)

## APPENDIX E

28 United States Code § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

## APPENDIX F

33 United States Code § 1365. Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of United States

Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter " means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title.[1]

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[1] So in original.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

**APPENDIX G**

STATE OF WISCONSIN CIRCUIT COURT
MILWAUKEE COUNTY

[Filed May 29, 2002]

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Case No. 02-CV-2701

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STATE OF WISCONSIN,

*Plaintiff,*

v.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

*Defendant.*

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STIPULATION

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WHEREAS, the State of Wisconsin has sued the Milwaukee Metropolitan Sewerage District (District), alleging that at least 8 sanitary sewer overflow events associated with filling of the District's Inline System since 1994 are violations of the District's Wisconsin Pollution Discharge Elimination System (WPDES) permit;

WHEREAS, these events are described by date in the State of Wisconsin's March 15, 2002 Complaint, and each date listed may refer to a sanitary sewer overflow event that occurred over more than one consecutive calendar day;

WHEREAS, the State of Wisconsin has reviewed all reports of potential and confirmed sanitary sewer overflows made by MMSD to the Department of Natural Resources (Department), including reports contained in Five Day Notice Letters, Quarterly Overflow Reports, and Compliance &

Maintenance Annual Reports pursuant to NR 208 (collectively, District Reports). Based on this review, the State of Wisconsin has identified overflows in addition to those specifically listed in the Complaint. It is the intent of the parties that this stipulation presents a comprehensive solution to sanitary sewer overflows, regardless of their cause, including but not limited to wet weather events, equipment malfunctions, and operator error. This stipulation therefore resolves the District's potential liability for all alleged sanitary sewer overflows to the latest date upon which either of the parties executes this agreement. To the extent that any other sanitary sewer overflows identified in the District Reports constitute permit violations, those violations are addressed through this stipulation;

WHEREAS, the District denies that it has violated its permit or the Federal and State Clean Water Acts;

WHEREAS, the State, through the Wisconsin Department of Natural Resources (Department), believes that, in lieu of a penalty assessment or other monetary sanction, the establishment of a legally binding long-term corrective action program for future water pollution abatement construction projects as identified in the Department-approved 2010 Facilities Plan and in future planning for the year 2020 is consistent with the missions of both agencies to meet the requirements of the Federal and State Clean Water Acts, including the elimination of sanitary sewer overflows and the further reduction of combined sewer overflows, and to redress alleged sanitary sewer overflow violations of the District's WPDES permit;

WHEREAS, the parties wish to resolve their dispute in order to avoid the cost and uncertainty of further litigation;

NOW, THEREFORE, it is hereby stipulated by and between the District and the Department that:

## 2010 FACILITIES PLAN; ADDITIONAL STORAGE AND CONVEYANCE CAPACITY; INSTRUMENTATION AND CONTROLS

1. The projects approved by the Department in the 2010 Facilities Plan as identified in Exhibit I hereto shall be fully constructed and operational no later than December 31, 2010. The current estimate of cost of each facility is also identified in Exhibit I.

2. In addition to the projects identified in paragraph 1 above, the District shall build additional storage and conveyance capacity as part of two projects previously approved by the Department, and shall add one new conveyance project. These three additional projects will increase the total storage in MMSD's deep tunnel system from 405 million gallons to approximately 521 million gallons, and are as follows:

A. An enlargement of the Northwest Side Relief Sewer Project, resulting in a 7.4 mile, 20-foot diameter sewer that will add approximately 89 million gallons of storage capacity to the existing conveyance system. The Department has approved construction of this project and it shall be constructed by no later than December 31, 2006.

B. An enlargement of the Wisconsin Avenue Sewer Project, which is planned to be approximately two miles long, 20 feet in diameter, and will add approximately 24.8 million gallons to the existing conveyance system. The Wisconsin Avenue Sewer Project shall be submitted to the Department for approval by no later than June 30, 2006 and, following approval, shall be constructed by no later than December 31, 2009.

C. The new project to be built is the Port Washington Road Sewer Project, which is planned to be approximately two miles long and 6 feet in diameter, and will add approximately 2.2 million gallons to the existing conveyance system. The Port Washington Road Sewer Project shall be submitted

to the Department for approval by no later than December 31, 2007 and, following approval, shall be constructed by no later than December 31, 2009.

3. As a component of the upgrade of its instrumentation and control (I & C) system, the District shall install a global predictive Real Time Control (RTC) system. The RTC system shall provide additional controls to maximize the use of the additional storage described in paragraph 2 above and upgrade the MIS flow monitoring network to assure that adequate wastewater flow data of the total flow is available for at least 75% of the total flow from the separate sewer tributary area. Additional rain gauges shall be added to the District's existing rain gauge network as necessary. A plan for implementing the global predictive RTC system and rain gauge data upgrade shall be completed and submitted to the Department by no later than December 31, 2002. The global predictive RTC system and the rain gauge data monitoring upgrade shall be constructed and fully operational by no later than December 31, 2004. The District shall provide for removal of daily infiltration and inflow from the deep tunnel system to the maximum extent practical to have maximum storage capacity available prior to any forecasted precipitation. The entire upgrade to the I & C system shall be completed by no later than December 31, 2008.

## 2020 FACILITIES PLAN

4. The 2020 Facilities Planning Project shall identify capital improvements necessary to handle wastewater conveyance, storage and treatment needs through 2020. The State, through the Department of Natural Resources, acknowledges that the District plans to spend approximately $28.4 million on this plan between 2001 and 2007. Development of the 2020 Facilities Plan shall include upgrading the Geographic Information System (GIS), a complete Environmental Assessment, ongoing collection and preservation of

systems monitoring data, an active stakeholder involvement program, and development of a Wet Weather Control Plan. The level of protection design standard to be achieved under the 2020 Facilities Plan shall be consistent with applicable Wisconsin and federal law. The proposed 2020 Facilities Plan shall be adopted by the District Commission and submitted to the Department by no later than June 30, 2007. The Department shall issue its final determination on the 2020 Facilities Plan by no later than December 31, 2007. Following the Department's final determination on the 2020 Facilities Plan, or the conclusion of any administrative or judicial challenge thereto, the District and the Department may, subject to court approval, amend this Stipulation to include deadlines for the completion of all projects needed to ensure compliance with permit requirements.

## INFILTRATION AND INFLOW (I/I) REDUCTION PROGRAM

5. The District shall undertake a program for I/I reduction that shall include the following:

A. The *limited sanitary sewer evaluation study* (LSSES) which was part of the 2010 Facilities Plan authorized the use of District funds ($9 million) to smoke test, inspect manholes and add flow monitors to the satellite systems. The LSSES shall be completed by no later than December 31, 2002. The 28 satellite municipalities shall in sum take actions to achieve a 5% reduction by no later than December 31, 2002, from those portions of the sanitary sewer system which are located in the public right of way.

B. *I/I Reduction Demonstration Projects*. Eight satellite municipalities have been selected for the performance of I/I reduction demonstration projects on their systems. The bulk of this work, which began in 2000, consists of identifying the source and the cost and benefit of removing I/I on private property. The I/I reduction demonstration projects shall be

constructed and operational by no later than December 31, 2002. Ongoing post construction monitoring shall begin by no later than January 1, 2003. These projects will provide information on costs and repairs which may be used to specify a more universal approach throughout the service area.

C. *I/I reduction on private property*. The District has initiated a project for I/I reduction on private property. This project shall evaluate the information from the limited sanitary sewer evaluation studies/sanitary sewer evaluation studies and from the related I/I reduction demonstration projects to develop a regional approach to reduce I/I on private property. The project shall prioritize "sewersheds" by their rates of I/I and require by District rule the 28 satellite municipalities to systematically make improvements to those sewersheds to reduce excessive I/I on private property and ultimately reduce public health and safety concerns caused by such I/I. This is a multi-year project. The District's share of the project will be budgeted annually based on the priority and estimate of cost for each sewershed. The current estimate of costs for the Six Year Capital Improvement Plan period is $2.85 million as described in Exhibit I. The District rules requiring these improvements shall be adopted by no later than June 30, 2007.

D. The District has adopted a regional stormwater rule which requires the use of best management practices in order to mitigate the negative impacts of stormwater runoff to the District's system. The purpose of the regional stormwater rule is to: reduce the unsafe conditions, property damage, economic losses and adverse health effects caused by flooding; improve the effectiveness of flood abatement facilities and watercourse improvements; reduce the number and magnitude of releases of wastewater to the environment from sanitary and combined Sewers and protect wastewater collection and treatment facilities from high flows; promote com-

prehensive watershed planning and intergovernmental cooperation; and restore and enhance opportunities to use and enjoy the watercourses in the District service area. The District shall report annually to the Department regarding its regional stormwater rule enforcement efforts.

## CAPACITY, MANAGEMENT, OPERATION AND MAINTENANCE (CMOM) PROGRAM

6. Combined sewer overflows and sanitary sewer overflows present important concerns for public health and the environment. The State, through the Department of Natural Resources, acknowledges that the District has accomplished significant reductions in the number of overflows experienced within the District's Metropolitan Interceptor Sewer System through implementation of the Water Pollution Abatement Program (WPAP).

7. While sanitary sewer overflows in the District's system have been significantly reduced, there are still sanitary sewer overflows within the District's and its satellite municipalities' sanitary sewer systems. To continue the District's program to reduce with the goal of eliminating all non-permitted sanitary sewer overflows, the District shall implement a regional Capacity, Management, Operation and Maintenance (CMOM) program. The regional CMOM shall be comprised of four integrated components:

A. *Management Plan.* A plan that outlines the goals of the CMOM, the organizational structure to manage it, the legal authority to control I/I, design criteria, benchmarking data and performance measures to attain the goals. A significant effort associated with the management plan shall be the development of an asset management program that provides for both programmed maintenance and tracking of the asset condition to enable early recognition of expansions or major rehabilitation necessary to avoid capacity limitations.

B. *Overflow Response Plan.* An overflow response plan that identifies measures to protect public health and the environment. This plan will outline the public notification, permit reporting, measuring and monitoring steps to be taken during an overflow event.

C. *System Evaluation and Capacity Assurance Plan.* A plan for system evaluation and capacity assurance for peak flow conditions. This plan shall identify necessary capital improvements to meet the projected flows and an implementation plan that describes timing and responsibilities for implementing each capital improvement.

D. *Communication and Program Audit Plan.* On a regular basis the District shall report to the Department on the implementation and performance of the CMOM program. The communication and program audit plan shall allow for public input during the development and implementation of the CMOM.

E. The approach to be used by the District to initiate and maintain the CMOM program shall include the following steps:

1) Retention of a consultant by no later than December 31, 2002, to provide program oversight and guidance.

2) Review of existing operations and existing management and capital improvement plans.

3) Development of an action plan to assess the required changes to existing plans and to develop a critical plan approach to a CMOM program.

4) Concurrent with previous steps, review of existing information on asset management, including field verification as required, and software development to provide a simplified data base to manage the capital assets of the District.

5) Open and maintain a CMOM dialog with the 28 satellite municipalities through the Technical Advisory Team[1] with the goal of assisting the satellite municipalities with developing individual CMOM programs. The District shall develop prospective measures for the satellite systems that will reflect the requirements of the District's regional CMOM program.

6) This entire CMOM initiative will be coordinated with the ongoing facilities planning and shall be completed by no later than June 30, 2007 and documented in the 2020 Facilities Plan to ensure future oversight of this program.

INPLANT DIVERSIONS DURING WET WEATHER

8. The Department and the District agree that diversions of wastewater flow within either of the two District treatment plants during wet weather events may occur only when all of the following conditions are met:

A. Inplant diversions may occur only when flows exceed the capacity of preliminary, primary or secondary facilities. During such inplant diversion the treatment system is operated as it is designed to be operated and in accordance with the conditions set forth in the District's WPDES permit.

B. The District's WPDES permit application provides notice of, and the permit specifically recognizes, the treatment scheme that will be used for peak flow management. The treatment scheme, including the designed capacity of various units, shall be consistent with generally accepted practices and design criteria.

C. The District's WPDES permit contains appropriate requirements for the collection system, including at a mini-

[1] The Technical Advisory Team (TAT) is a group organized by the District and is composed of members of the District's engineering star engineering staff from each of the 28 satellite municipalities, the Department, and the southeastern Wisconsin Regional Planning Commission.

mum, that the permittee properly design, operate, and maintain its collection systems and conform to the 1994 Combined Sewer Overflow (CSO) Control Policy.

D. The final discharge meets effluent limitations based on secondary treatment and any more stringent limitations necessary to meet water quality standards.

## SATELLITE MUNICIPALITIES

9. Infiltration and inflow reduction efforts by the 28 satellite municipalities will continue to be required under District Rules, Chapter 3, Infiltration and Inflow Control. In addition, each satellite municipality shall be required, by District rules, to develop a local CMOM by no later than two years after completion of the District's regional CMOM Program. Prior to promulgation of the District rules, the Department may issue WPDES discharge permits to individual satellite municipalities, as necessary to require, *inter alia*, I/I reduction efforts by fixed dates. Following promulgation of the District rules, the Department may issue WPDES discharge permits to individual satellite municipalities, as necessary to require, *inter alia*, CMOM development and I/I reduction efforts by fixed dates.

## LONG TERM CONTROL PLAN FOR COMBINED SEWER OVERFLOW

10. The State, through the Department of Natural Resources, acknowledges that the District is currently in full compliance with the provisions of WPDES PERMIT No. WI-0036820-1 regarding combined sewer overflows and the performance standards for the Inline Storage System (ISS) as stated at Section J.(I) of that permit. Those overflow frequency standards are based on the USEPA Combined Sewer Overflow (CSO) Control Policy. Further combined sewer overflow control will be achieved as the result of the District building additional separate sewer storage capacity in

accord with the approved 2010 Facilities Plan under the schedule described in paragraph 1 above, including the Northwest Side Relief Sewer, the Wisconsin Avenue Sewer, and the Port Washington Road Sewer. This additional separate sewer storage capacity will, under certain circumstances, have the effect of allowing additional capacity in the existing Inline Storage System to become available to store combined sewer flows which would otherwise be bypassed during unusually severe wet weather events. The effectiveness of these construction projects, the CMOM initiative, and the I/I reduction efforts of the satellite municipalities under the 2010 Facilities Plan will be evaluated as part of the 2020 Facilities Planning effort. The 2020 Facilities Plan shall make additional recommendations for further combined sewer overflow control as may be required by Wisconsin or federal law, and that Plan will constitute the District's Long Term Control Plan for CSO in accord with the U.S. EPA Combined Sewer Overflow Control Policy, 59 FR 18688. The proposed 2020 Facilities Plan shall be adopted by the District Commission and submitted to the Department by no later than June 30, 2007.

EXFILTRATION

11. A. Upon the startup of the Inline Storage System during late 1993 and early 1994, the District became aware that exfiltration of wastewater into the rock surrounding the tunnel appeared to occur during and after normal operation of the tunnel in fill events resulting from wet weather. The District notified the Department during 1994 of this fact. The WPDES discharge permit in effect at the time of tunnel start-up contained certain Operational Requirements (Section I(1)) and Monitoring Requirements for Groundwater Monitoring Wells and Piezometers (Section 1.(2)) which were based upon preconstruction prediction of ISS operation and which did not anticipate exfiltration during normal tunnel operation. Actual experience with tunnel operation revealed that certain,

terms of the permit were not achievable with normal tunnel operation during tunnel fill events.

B. After expiration of that discharge permit, the Department issued on June 29, 1997, a successor permit to the District, WPDES Permit No. WI-0036820-1. The successor permit also included the Operational Requirements and Monitoring Requirements for Groundwater Monitoring Wells and Piezometers which had appeared in the prior permit, but in addition included a Schedule of Compliance for the Inline Storage System. The overall purpose of the Compliance Schedule was to require the District to study the performance impacts of the ISS and to determine how to attain compliance with the requirements of the discharge permit.

C. These studies have been performed by hydrogeologists at the firm of Camp Dresser & McKee Inc. (CDM) on behalf of the District since the start up of the ISS in accord with the requirements of WPDES Permit No. WI-0036820-1, Section O., *Schedule of Compliance for Inline Storage System*, page 45. These reports are: (1) *Evaluation of Inline Storage System Groundwater Monitoring Data*, May 1995; (2) *Inline Storage System Evaluation of 1995 Groundwater Monitoring Data*, December 1996; (3) *Inline Storage System ISS/Bedrock Interaction Hydraulic Evaluation*, January 1998; and (4) *Inline Storage System Assessment of Tunnel Water Migration*, May 1998. The Department has evaluated these reports as they have been completed.

D. On the basis of these studies, CDM believes that some exfiltration of wastewater from the Inline Storage System (ISS) unavoidably occurs during normal tunnel operation at times when the ISS is used to store wastewater during wet weather events. CDM believes that the exfiltration which occurs does not, pose a danger to the aquifer since the wastewater exfiltrate begins to return to the tunnel system as soon as the pumpout of the tunnel system begins. The studies by CDM have verified the importance of maintenance of the

elevation minus 177.17 MMSD datum maximum fill level as a means of minimizing the impacts of tunnel exfiltration. The District has instituted operating changes to ensure that the minus 177.17 datum is not exceeded. The District shall undertake all reasonable efforts, when operating the tunnel, to minimize exfiltration from the ISS.

E. By letter dated August 27, 1997, the District filed a request for a contested case hearing challenging certain operational requirements imposed on the Inline Storage System under the successor permit, WPDES Permit No. WI-0036820-1, Section 1, *Inline Storage System, Requirements*, page 13. A copy of this hearing request is attached hereto as Exhibit II. The District filed the hearing request because, at the time of issuance of the successor permit, it believed that certain of the Operational Requirements stated in that permit were unachievable if the ISS was to be operated as it was intended, i.e., to store wastewater underground for later treatment. This contested case hearing request is currently pending, and the District and the Department have been meeting regularly since 1997 to discuss the CDM study results, the groundwater data gathered by the District, and the possible resolution of the issues raised in the pending hearing request.

F. As the result of the groundwater information gathered to date and analyzed by CDM, the District intends to conduct further studies in the areas of groundwater monitoring wells CT-MW-01 and CT-MW-07. The Department shall continue to evaluate the groundwater data gathered and reported by the District under the requirements of its WPDES permit. The Department may require additional reports on tunnel impacts to groundwater in a Compliance Schedule when the WPDES permit is reissued and may provide for appropriate operational limitations on the Inline Storage System in the next permit, expected to be issued during 2002.

DISCHARGE PERMIT

12. The Department's expected 2002 reissuance of the District's WPDES permit will be consistent with, but not limited to, the terms of this Stipulation. Except for the yet to be determined permit requirements arising from paragraph 11F, the District hereby agrees that it will not object to any permit condition which directly relates to any term of this Stipulation and which is contained in the WPDES permit which is expected to be reissued to the District by the Department during 2002.

13. Nothing in this Stipulation, unless otherwise expressly stated, prohibits the Department from amending or modifying the terms of the District's WPDES permit as required or permitted by state and federal law, or as subject to requirements for public notice and comment.

STIPULATION COMPLIANCE

14. A. A construction project approved under the 2010 Facilities Plan shall be deemed to be initiated in compliance with the terms of this Stipulation in the event the District awards a contract for the project, provided the contract is awarded by no later than December 31, 2009.

B. If the District determines that it will be unable to award a particular contract or take any other action in accordance with this Stipulation for any reason, the District shall notify the Department in writing of its determination including the reasons therefore. Such notification shall occur as soon as the District is reasonably able to predict it will not be able to meet the requirement(s) of this Stipulation. Within sixty days of the receipt of such notification, the Department shall either concur or disapprove in writing; the Department shall state its reasons for disapproval. Within fifteen days of the receipt of any such disapproval from the Department either party may move the court in this case for a resolution of the dispute(s).

15. The District shall provide to the Department an Annual Report by no later than December 31, 2001, and each year thereafter until 2010. The Annual Report shall summarize the projects completed to date and the current plan for completing the 2010 Facilities Plan projects; the Commission approved annual capital expenditure for the next year (i.e., the 2001 Annual Report will contain the 2002 approved capital budget); and a Master Program Schedule that reflects the projects in the then current Six Year Financial Plan. The Annual Report shall include all projects from the 2020 Facilities Plan included in this Stipulation under the provision of paragraph 4.

16. The parties expressly rescind the Stipulation dated September 7, 2001, and filed in the Dane County case of *Sewerage Commission of the City of Milwaukee et al. v. State of Wisconsin, et al.*, Case No. 152-342. All other Stipulations previously entered. as orders in Dane County Case No. 152-342 continue in full force and effect.

17. Except as between the parties hereto, nothing in this Stipulation should be construed as an admission of liability by the District to any of the allegations made in the same-captioned complaint.

18. The Court shall maintain continuing jurisdiction over this case in order to enforce the terms, conditions, and agreements in this Stipulation.

USE OF ACTUAL SIGNATURE TRANSMITTED BY FACSIMILE MACHINE

19. The parties agree that the approval of this Stipulation may be achieved by the actual signature of the parties' authorized representatives, a copy or facsimile of said actual signature being as valid as the original.

Dated: May 16, 2003

/s/ Michael J. McCabe
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Dated: 5/17/02

/s/ Eric J. Callisto
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*Attorney for the State of Wisconsin*

STATE OF WISCONSIN
CIRCUIT COURT
MILWAUKEE COUNTY

[Filed May 29, 2002]

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Case No. 02-CV-2701
Case Code: 30703

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STATE OF WISCONSIN,

*Plaintiff*,

vs.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

*Defendant.*

---

# ORDER

The State of Wisconsin and Milwaukee Metropolitan Sewerage District, having executed the annexed stipulation, and the Court having reviewed the file herein,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That said stipulation is approved and made a part of the record herein and is hereby made binding on the parties.

2. That this Court has jurisdiction over the defendant and over the subject matter of this action.

3. That the defendant shall undertake the activities described in the annexed stipulation by and on the dates set forth in the stipulation, and shall comply in all respects with its obligations as set forth in this stipulation.

4. That no costs shall be awarded to either party upon entry of this Order.

Dated this 29th day of May, 2002.

BY THE COURT:

/s/ M. Flanagan
Circuit Court Judge

(4)

No. 04-889

Supreme Court, U.S.
FILED
FEB 2 - 2005
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

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MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
*Petitioner*,

v.

FRIENDS OF MILWAUKEE'S RIVERS AND
LAKE MICHIGAN FEDERATION,
*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

This case actually raises the following questions.

1. Whether the court of appeals properly applied Wisconsin's state law doctrine of res judicata.

2. Whether the court of appeals properly remanded this case to the district court for consideration of whether Wisconsin's "fairness" exception to its res judicata doctrine should apply here, given the unique facts of this case, *i.e.*, a municipal sewerage district, which consistently has failed for decades to comply with its permit obligations and the Clean Water Act, entered into a quick settlement of state enforcement litigation filed (after Respondents had filed their citizen suit) by state officials who had tolerated the district's years of noncompliance.

## RULE 29.6 STATEMENT

Respondent Friends of Milwaukee's Rivers is a not-for-profit corporation organized under the laws of the State of Wisconsin. It does not have a parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Lake Michigan Federation is a not-for-profit corporation organized under the laws of the State of Illinois. It does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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No. 04-889

In the
# Supreme Court of the United States

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

PETITIONER,

*v.*

FRIENDS OF MILWAUKEE'S RIVERS AND
LAKE MICHIGAN FEDERATION,

RESPONDENTS.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION

This case does not present the issues asserted by Petitioners. Rather, the decision of the court of appeals below turns upon applying Wisconsin state law on res judicata to a unique set of facts: a municipal sewerage district that has not met its permit obligations for decades confronted with a citizen suit under the Clean Water Act quickly settles

a subsequently-filed state enforcement action filed by officials who steadfastly had refused to enforce its permit obligations before the citizen suit. Perhaps most significant, the court of appeals merely has remanded the case below to the district court for a more detailed analysis of how Wisconsin res judicata law applies to these facts. Consequently, the preclusive effect of the state court judgment has not even been resolved as yet. There is, therefore, no reason for this Court to issue a writ of certiorari in this case at this time.

## STATEMENT OF THE CASE

Invoking their right to sue under the Clean Water Act ("the Act"), Respondents filed their citizen enforcement action in federal district court against the Milwaukee Metropolitan Sewerage District ("the District") in the morning of March 15, 2002, a date more than sixty days after notifying the District of their intent to sue, as allowed by the Act. 33 U.S.C. § 1365(b)(1)(A). Respondents' complaint alleged, in pertinent part, that the District had discharged untreated sewage (also referred to as sanitary sewer overflows ("SSOs")) from at least 165 locations, in fundamental and continuing violation of the Act and the District's discharge permit.

Later in the day of March 15, 2002, the State also filed a complaint against the District but did so in Wisconsin state court. The State's lawsuit alleged a total of only eight violations.

On May 29, 2002, in the State's lawsuit, the Milwaukee County Circuit Court approved a stipulation agreed to by the State and the District, which purported to resolve all claims the State raised in its lawsuit. Respondents were not parties to and did not participate in the formulation

of the stipulation. Two days later, on May 31, 2002, the District filed a motion in federal court to dismiss the Respondents' complaint, arguing (1) that the district court lacked subject matter jurisdiction and, in the alternative, (2) that in light of the resolution of the state lawsuit, the Respondents' claims were barred by the doctrines of mootness and res judicata. The district court granted the motion to dismiss on September 29, 2003, holding that Respondents' citizen suit was barred because the State had diligently prosecuted the District for its violations of the Act. In addition, the Court found that the doctrine of res judicata barred litigation of the issues raised in the Respondents' complaint.

## BACKGROUND FACTS

For more than thirty years, the District has violated the terms of its Wisconsin Pollution Discharge Elimination System ("WPDES") permit and the Act repeatedly, discharging over 13 billion gallons of untreated wastewater into Lake Michigan and the rivers in and around of the City of Milwaukee. (S. App. at 00095.) The District is the municipal corporation that provides sewer services to the City of Milwaukee and twenty-seven other surrounding municipalities. (*Id.* at 00217.)[1]

The District has been, and currently is, subject to a WPDES permit, issued by the State under the Act, that specifically prohibits SSOs: "No bypass or overflow of wastewater from the permittee's sanitary sewage system is

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[1] Citations to the Record on Appeal are "R-__ at __." Citations to the Appellants' Attached Required Short Appendix below are "App. at __." Citations to the Appellants' Separate Appendix below are "S. App. at __."

authorized by this permit." (S. App. at 00128.)[2] Despite this clear prohibition against SSOs, SSOs have occurred from at least 165 separate locations between 1995 and 2002. (*Id.* at 00102.)[3]

The Wisconsin Department of Natural Resources (the "State") — the state agency entrusted with protecting Wisconsin's valued natural resources and environment — for thirty years has failed to discharge its responsibilities to stop these illegal SSOs. (S. App. at 00219, 00231.) When it became clear that the State had failed to perform the duty the federal government delegated to it and prosecute an enforcement action (through its attorneys, the Wisconsin Department of Justice) against the District, the Respondents filed this citizen suit in an effort to protect the citizens who reside, work, and recreate in the Milwaukee area and who use, enjoy, or rely on the waters of Lake Michigan and its surrounding waterways. (*Id.* at 00095 - 00114.)

**Sewer Overflows Into Lake Michigan and Connecting Rivers.**

Separated sanitary sewers are used to carry sewage, often untreated, from residences, commercial buildings, industries, and other institutions to interceptor sewers, which feed into wastewater treatment facilities. (S. App. at 00056-00057.) Separated sanitary sewers protect the public health and the environment by transporting this waste safely to

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2 The WPDES permit enumerates three exceptions to the prohibition of SSOs. At no time during this litigation has the District invoked one of these exceptions in its defense.

3 The District also oversees an older system of combined sewers, which carry both untreated sewage and storm water. Its WPDES permit allows a maximum of six combined sewers overflows ("CSOs") a year, provided that Lake Michigan's water quality does not suffer. (S. App. at 00231, 00269, 00278.)

wastewater treatment facilities for treatment before being discharged to local waterways. (*Id.* at 00057.) When a separated sanitary system has inadequate capacity or is improperly managed, however, the untreated sewage is discharged directly into local waterways. (*Id.*) Usually these discharges, or overflows, occur during heavy rain events. The District, however, also has caused a number of dry weather sewer overflows, which result from either operational errors or equipment failures. (*Id.*) These unpermitted discharges, whether during dry spells or heavy rain events, are referred to as sanitary sewer overflows, or SSOs, and they violate the Act. (*Id.*)

SSOs pose significant public health problems. (S. App. at 00263.) Untreated sewage can be extremely dangerous to the health of area residents, aquatic plants, and wildlife. (*Id.*) Chronic overflows, like those caused by the District, deprive fish and other aquatic life of oxygen. (*Id.* at 00263-00264.) Untreated sewage degrades the water quality of lakes and rivers. (*Id.*) One million gallons of SSO waste water can contain 833 pounds of biological oxygen demand, 16.7 pounds of phosphorous, 1,000 pounds of suspended solids, and 19 million pounds of fecal coliform.[4] (S. App. at 00264.) The District has discharged over one billion gallons of SSOs since 1995. (*Id.* at 00233.)

Untreated SSO waste water can taint community water supplies. (S. App. at 00265.) Raw sewage can force communities to close beaches and curtail recreational activities because of the health risks posed by the sewage, thus depriving citizens of their ability to enjoy its natural resources. (*Id.* at 00265-00266.) In recent years, Milwaukee area beach closures have increased due, in part, to significant

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[4] Biological oxygen demand is oxygen-demanding pollutants that deplete the volume of oxygen in the water. (R-23 at 97.)

repeated SSOs. (*Id.*) Residents who swim, boat, or fish in lakes and rivers that have been contaminated with sewage can be exposed to disease-causing bacteria, viruses, and other pathogens, including cryptosporidium, which can cause gastrointestinal illnesses and, in extreme cases, even death. (*Id.* at 00263.)

The District has violated its WPDES permit continuously at least since 1976. (S. App. at 00219, 00231.) From 1995 to 2002 alone, the District's sanitary sewer system discharged over 13 billion gallons of untreated sewage and storm water into Lake Michigan and the Milwaukee, Kinnickinnic, and Menomonee Rivers. (*Id.* at 00233.)

**The State's Abdication of Enforcement Responsibility.**

Since at least 1976, the State has abdicated its responsibility to hold the District accountable for the District's failure to comply with the Act and its WPDES permit. (S. App. at 00219, 00231.) In 1976, the District's predecessor sued the State seeking a declaratory judgment that the District need not comply with the Wisconsin regulations that implemented the Act's secondary pretreatment standards for wastewater. (*Id.* at 00001-00002.) The litigation was resolved by a stipulation (the "1977 Stipulation") that contained few enforceable standards and did not contain any provision requiring the District to cease SSOs or comply with the Act. (*Id.* at 00003.)

The District's key capital project to eliminate SSOs under the 1977 Stipulation was its planned "Deep Tunnel" project. (*See* S. App. at 00211.) The Deep Tunnel finally started operating seventeen years later, in 1994. (*Id.*) The District claimed that the Deep Tunnel would eliminate SSOs

by providing sufficient capacity for storing untreated waste and storm water until the untreated waste water could be sent to the treatment facilities. (*Id.* at 00222.) Soon after Deep Tunnel became operational, however, it became evident that this was not the answer to the District's capacity problem. (*Id.* at 00231.) The quality of the surface waters in the area the District serves did not improve (*id.* at 00268-00274), and the District continued to experience numerous significant SSOs that violated its WPDES permit and the Act. (*Id.* at 00211-00212, 00231, 00237-00239.) Nevertheless, the State did not initiate any enforcement action against, or otherwise diligently prosecute, the District to require further specific actions to comply with the law, or to recover penalties. (*Id.* at 00231, 00247.)

**Respondents' Citizen Suit.**

In light of this history of noncompliance and the State's lack of diligent enforcement, Respondents sent their statutory Notice Letter to the District on July 11, 2001, copying the State and other necessary parties. (S. App. at 00105-00111.) The Notice Letter identified "at least thirteen (13) occasions during which at least 165 SSO discharge locations within [the District's] jurisdiction discharged sanitary sewage" from the District's sewerage collection system since January 1, 1994, including dry weather SSOs. (*Id.* at 00106.)

Five days after receiving Respondents' Notice Letter, the State finally sent a letter to the District informing it that several SSO discharges identified in the Respondents' Notice Letter were violations of the District's WPDES Permit and the Act. (R-19 at 86-89.) Before this letter, the State had not notified the District of *any* SSO violations, even though the

District's quarterly reports revealed repeated violations of the District's WPDES permit and the Act. (S. App. at 00215.)

Respondents heard nothing from the District or the State in response to the Notice Letter until late in the afternoon of Friday, September 7, 2001, just one day before the expiration of the sixty-day waiting period required by the Act. (R-19 at 90-116.) On that date, Respondents received a facsimile copy of a "new" stipulation (the "2001 Stipulation") that the State had executed with the District, and which the State apparently already had filed that same day in the *1977* case before the Dane County Circuit Court. (*Id.*) The State and District provided no opportunity whatsoever for Respondents or the public to comment on the "new" stipulation. (R-18 at 7.)

The Dane County Circuit Court, however, subsequently refused to enter the proffered stipulation on the docket of its 1977 case, stating: "It does seem to me that at some point a court's involvement in a case must end. It also seems to me that this case has gone well beyond that point." (R-19 at 117.)

Only after the Dane County Circuit Court rejected the new stipulation did the District finally agree to discuss with Respondents their concerns over the terms of the proposed 2001 Stipulation and to meet with representatives of both organizations. (R-19 at 119.) Three months later, after settlement negotiations failed, Respondents filed this lawsuit on March 15, 2002 in the United States District Court for the Eastern District of Wisconsin. (R-1 at 1-10.)

Several hours after Respondents filed their citizen suit, the State filed a new lawsuit against the District. (R-18 at 9-10.) This time, however, the State filed its lawsuit in the

Milwaukee County Circuit Court, instead of the Dane County Circuit Court. (*Id.*) In contrast to the 165 locations where violations occurred, as alleged in Respondents' complaint, the State's complaint alleged that the District violated its WPDES Permit on only eight occasions and did not allege any dry weather SSOs. (R-18 at 10.)

**The 2002 Milwaukee County Lawsuit and Stipulation.**

On May 29, 2002, while the Respondents' citizen suit was pending, the Milwaukee County Circuit Court, at the request of the State and the District, entered a stipulation (the "2002 Stipulation") that settled the State's lawsuit. (S. App. at 00178-00204.) The 2002 Stipulation, which basically mirrored the 2001 Stipulation that the Dane County Circuit Court rejected, allowed the District to follow a "program" rather than requiring the District to stop violating the law and harming the environment. (*Id.* at 00179.) Just like the 1977 Stipulation, the 2002 Stipulation contained lengthy and generous schedules to implement vague and ambiguous corrective measures with few enforceable guidelines. (*Id.* at 00178-00204.) It also failed to provide any consequences in the event of the District's non-compliance with the 2002 Stipulation's provisions. (*Id.*) In addition, the 2002 Stipulation did not require the District to pay any civil penalties for any of the District's past SSOs and did not prohibit future SSO discharges from the District's sewerage system. (*Id.*)

Notably, the 2002 Stipulation also failed to incorporate many of the lengthy and detailed recommendations made by the State to the Natural Resources Board in a March 15, 2001 report entitled "Sewer Overflows in Wisconsin." (S. App. at 00089-00092.) Although the State made these same recommendations in its July 16, 2001 letter

to the District (R-19 at 86-88), the State stipulated to far less rigorous, and less protective, measures. (S. App. at 00178-00204.)

**The Wisconsin Legislative Audit Bureau Report.**

Only two months after the Milwaukee County Circuit Court approved the stipulation, the Wisconsin Legislative Audit Bureau released its audit evaluating the District (the "Audit Report"). (S. App. at 00205-00301.) This report came on the heels of the earlier report produced by the State to the Natural Resources Board in response to the escalating number of SSOs that occurred in 1999 and 2000. (*Id.* at 00050.) The Audit Report, titled "An Evaluation: Milwaukee Metropolitan Sewerage District," highlighted the State's continuing failure to act in an effective and diligent manner to address the District's continued violations of the Act, and graphically detailed how the District had failed to eliminate the discharge of sewage into area waterways. (*Id.* at 00211-00213.) The Audit Report noted that the Deep Tunnel had not functioned in the manner in which the District had promised. (*Id.* at 00211-00212.) Although the Deep Tunnel was designed to "virtually eliminate" SSOs and significantly reduce combined sewer overflows, both types of overflows repeatedly have occurred in each year since the Deep Tunnel became operational. (*Id.* at 00231.)

The Audit Report also found that the District has had serious and continual operational and management problems. (S. App. at 00240-00244.) For years, the District has failed to address inflow and infiltration problems caused by groundwater leaking into the sewerage system, despite being aware of the problem. (*Id.* at 00239-00240.) Because it has not controlled the inflow and infiltration of groundwater, the District frequently directs its contractor, United Water

Services, to discharge untreated sewage into Lake Michigan and the surrounding waterways even when the Deep Tunnel is at significantly less than capacity. (*Id.* at 00240, 00243, 00259-00260.) This action allowed an additional 107 million gallons of untreated wastewater to be discharged into area waterways during six overflow events from June 1999 to December 2001. (*Id.* at 00243.) These unlawful overflows also occurred because the District allowed United Water Services to shut off Deep Tunnel pumps during periods of peak electricity rates to save money. (*Id.*) During the summer of 2002, the District's contractor also failed to repair a broken sluice gate, which, on several occasions, also allowed significant overflows. (S. App. at 00280.) The Audit Report further noted that, instead of allocating its resources to ensure compliance with its WPDES permit and the Act, the District often makes decisions concerning resource allocation based on faulty economic and political considerations. (*Id.* at 00254-00258.)

**The District's Performance Since The 2002 Stipulation.**

The 2002 Stipulation has failed to stop significant SSOs from occurring. (S. App. at 00305-00308.) During one week in August 2002, the District dumped 412 million gallons of sewage into Lake Michigan and rivers surrounding Milwaukee – the largest such overflow in nearly two years. (*Id.*) Boaters on Lake Michigan at the time noted that "debris including condoms and other trash generally flushed from toilets ended up in Lake Michigan." (*Id.* at 00307.) Observers of the Milwaukee and Kinnickinnic Rivers noted that the sewage discharged into those waterways contained a wide assortment of debris, including bottles, condoms, bags, and tampons. (*Id.*)

Indeed, even after argument before the court of appeals in this case, which occurred on March 29, 2004, the District's poor performance continued. As the court of appeals noted in its opinion, heavy rainfalls in May 2004 led the District to dump "'an unprecedented 4.6 *billion* gallons of raw sewage' directly into Lake Michigan and Milwaukee area streams and rivers." (Pet. App. A, at 3a n.1, quoting Rohde and Schultze, *Sewage Dumped in May: 4.6 Billion Gallons*, Milwaukee Sentinel, May 29, 2004, at IA (Court's emphasis)). Half a billion gallons of that total came from SSOs; the remainder came from CSOs.

**The Court of Appeals Opinion.**

The court of appeals issued a carefully-crafted 35-page opinion that demonstrates a complete understanding of the highly-detailed record on appeal and a thoughtful analysis of the law. After an accurate and unchallenged outline of the Clean Water Act's conditions for filing and maintaining a citizen suit (Pet. App. A at 8a-9a), the Court addressed whether any of the State's actions had barred Respondents' suit *ab initio*, and concluded that none had. (*Id.* at 9a-18a.) The District's Petition leaves this conclusion unchallenged. In other words, the District has abandoned its contentions that the Clean Water Act barred Respondents from filing their citizen suit in the first place in light of any actions the District or the State had taken in court or administratively.

The court of appeals then turned its attention to the district court's ruling on res judicata. The Clean Water Act does not specify what effect to give the settlement of a State enforcement action filed after the commencement of a citizen suit. (*Id.* at 18a.) The court of appeals rejected Respondents' argument that judgment in an after-filed state enforcement action cannot have a res judicata effect upon a prior-filed,

ongoing citizen suit. (*Id.* at 22a & n.9.) Instead, the court of appeals ruled, as the District had argued, that Wisconsin's doctrine of res judicata governs whether the settlement of the state enforcement action between the State and the District precluded Respondents' citizen suit. (*Id.* at 18a-19a.) Assessing Wisconsin res judicata law, the court of appeals rejected Respondents' argument that res judicata did not apply to their citizen suit because that citizen suit is broader than, and different in scope from, the State enforcement action. The court of appeals further rejected Respondents' argument that there could be no privity between the State and Respondents. (*Id.* at 19a-22a & n. 9.)

The court, however, also rejected the District's position that Respondents were bound by res judicata even if the State had not diligently prosecuted its enforcement action. (*Id.* at 22a.) Ultimately, after examining the record facts concerning the State's prosecution of its after-filed enforcement action, the court of appeals concluded that questions remained for the district court to address concerning the diligence, or lack thereof, of the State's prosecution. (*Id.* at 31a-33a.) Consequently, the court remanded the matter and, in doing so, specifically directed the district court to address the question of the State's diligence, and also to "determine whether Wisconsin's fairness exception to the res judicata doctrine should be applied here." (*Id.* at 32a-33a & nn. 16-17.)

In so concluding, the court of appeals made the following observation concerning the conduct of the State and the District, up to and including the 2002 Stipulation: "The record to date does not inspire confidence that effective and timely action will be taken to address problems of long standing. While the 2002 Stipulation will hopefully result in fewer and smaller violations after the mandated projects are

completed, it is still, when all is said and done, a stalling tactic rather than a compliance strategy." (*Id.*)

Although the District did not ask the court of appeals for a stay pending this Petition under 28 U.S.C. § 2101(f), it did ask the district court to stay the proceedings until this Court ruled on this Petition. Upon Respondents' objection that such a stay was merely another "stalling tactic" to delay compliance, the district court denied that stay motion. The case is now proceeding to a resolution of the res judicata issue in the district court.

## REASONS FOR DENYING THE PETITION

As a review of the opinion of the court of appeals reveals, the court agreed with the District that Wisconsin state res judicata law applies to determine whether Respondents' Clean Water Act citizen suit may proceed in light of the District's prompt settlement of the State's after-filed enforcement suit. (Pet. App. A at 18a-19a.) The District's disagreement with the court of appeals concerns how the court applied Wisconsin state law. Consequently, the decision below presents only the questions of whether the court of appeals has correctly interpreted Wisconsin's doctrine of res judicata and whether that court has concluded correctly, based on the factual record before it, that a remand was required to assess whether the District's hasty settlement with the State should bar this suit under Wisconsin state law of res judicata. Should the district court decide that this case falls within Wisconsin's fairness exception to its res judicata doctrine, proceedings before this Court will be moot, because no ruling by this court on the issues the District has raised could then bar this citizen case from going forward.

## I. This Court Should Not Issue The Writ Of Certiorari To Review The Decision Below, Which Applies Wisconsin State Law And Holds Merely That A Remand Is Necessary To Determine Whether Wisconsin's Doctrine Of Res Judicata Applies To Bar This Suit.

Although the District seeks to cloak the decision below in federal garb, its complaint is with the court's application of state law. In its Petition, the District states: "The res judicata effect of final state court orders depends instead on the preclusion law of that State." (Pet. at 14.) The court of appeals so held. (Pet. App. A at 18a-19a.) Consequently, there is no issue here concerning the standard to be applied under 28 U.S.C. § 1738.

Rather, the District's complaint with the decision below is that "the Seventh Circuit ignored Wisconsin law under which persons with the same legal interests are held, as a matter of law, to be in privity. . . . Moreover, the Wisconsin Supreme Court has never applied or adopted § 42(1)(e) of the RESTATEMENT (SECOND) OF JUDGMENTS (1982), on which the Seventh Circuit relied for its authorization to graft a federal diligent prosecution analysis onto Wisconsin preclusion law." (Pet. at 15.)[5]

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[5] Nor has the Wisconsin Supreme Court ever *rejected* section 42(1)(e), though the Wisconsin courts have adopted other sections of the RESTATEMENT (SECOND) OF JUDGMENTS many times. *See, e.g., Universal Die and Stampings, Inc. v. Justus*, 174 Wis. 2d 556, 567, 497 N.W.2d 797, 802 (1993) (discussing Res. (2d) Judgments sec. 44); *Michelle T. v. Crozier*, 173 Wis. 2d 681 688-89, 495 N.W.2d 327, 330 (1993) (discussing Res. (2d) Judgments secs. 77 & 85); *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 311, 334 N.W.2d 883, 886 (1983) (discussing Res. (2d) Judgments sec. 24 & 25). As the following text illustrates, however, this is not the kind of issue worthy of a grant of certiorari.

This Court does not review questions of state law and therefore should have no interest in assessing the validity of the ruling on Wisconsin res judicata law by the court of appeals. "The process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar. . . ." *Michigan v. Long*, 463 U.S. 1032, 1038 (1983). But even if this Court were interested in Wisconsin's doctrine of res judicata, the District would be in no position to ask this Court to look over the shoulder of the court of appeals. In its brief to that court, the District cited only one Wisconsin state court case on res judicata, *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 525 N.W.2d 723 (1995) — which the court of appeals used as its primary guidepost on this issue. (*Compare* Brief of Appellee at 44-48, *with* Pet. App. A at 19a.) Of the ten other cases the District cited on res judicata, nine come from federal courts and one from Indiana state court. (Brief of Appellee at 44-48.) The District did *not* cite the court of appeals to *Gerhardt v. Estate of Moore*, 139 Wis. 2d 833, 407 N.W.2d 895 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988), *rev'd on other grounds*, 150 Wis. 2d 563, 441 N.W.2d 734 (1989), the *only* case it cites to this Court for the proposition that Wisconsin's doctrine of res judicata applies even though the State had failed to prosecute its enforcement action diligently.[6]

Ironically, the court of appeals discussed more cases from the Wisconsin Supreme Court in its opinion than the

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[6] Moreover, *Gerhardt* is inapposite. *Gerhardt* was a paternity case instituted by the State, in which the Wisconsin Supreme Court concluded that the *mother's* interests and the *child's* interests were in many respects identical. As between the *State* and the child's interests, the Wisconsin Supreme Court said that "the district attorney, *in deciding whether to initiate* a paternity action, did not represent the interests of the illegitimate child." 139 Wis. 2d at 840 (1987) (Court's emphasis).

District did in its brief, as well as many of the federal decisions the District had cited. (*See* Pet. App. A at 18a-33a & nn. 16-17.) Included among these cases are several discussing Wisconsin's fairness exception to its res judicata doctrine, *see Sopha v. Owens-Corning Fiberglass Corp.*, 230 Wis. 2d 212, 236, 601 N.W.2d 627, 638 (1999); *McCourt v. Algiers*, 4 Wis. 2d 607, 91 N.W.2d 194 (1958); *Froebel v. Meyer*, 217 F.3d 928, 935 (7th Cir. 2000) (Pet. App. A at 32a-33a & nn. 16-17). Because the court of appeals singled out Wisconsin's fairness exception to its res judicata doctrine for consideration on remand, this state law exception to a state law doctrine provides an independent state law basis for the decision of the court of appeals to remand. (*Id.*)

Furthermore, the District's supposed conflict between the decision below and *U.S. Envtl. Prot. Agency v. City of Green Forest*, 921 F.2d 1394 (8th Cir. 1990), is illusory. Indeed, the court of appeals below cited *City of Green Forest* with approval in connection with its privity analysis. (Pet. App. A at 22a.) As did the court of appeals below, the court in *City of Green Forest* stated: "We recognize that there may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-filed government enforcement action." 921 F.2d at 1404. In *City of Green Forest*, the court deemed the consent decree negotiated by the U.S. E.P.A. sufficient to avoid that eventuality: "In view of the consent decree in the instant case negotiated by the EPA and Green Forest, however, this is not such a case." *Id.* After a review of the state's history of non-enforcement and the failure of the hastily-assembled settlement even to chart a course towards compliance by the District with its permit obligations (after more than thirty years of noncompliance), however, the court of appeals below remanded this case to the district court with directions to determine whether this *is* "such a case."

Indeed, the District itself reveals the lack of a conflict between the decision below and *City of Green Forest*. In straining to make two cases applying the same law to very different facts appear to conflict, the District accuses the court of appeals below of "paying lip service" to the appropriate standard. (Pet. at 19.) In other words, the District acknowledges that the court of appeals identified the standard correctly, but argues that the court applied it incorrectly. Even if it were true that the court of appeals misapplied the correct standard below — and it is not — that would not justify a grant of certiorari: "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." S. CT. R. 10.

Were these reasons not enough to deny this Petition, there is yet another: this case is currently ongoing before the district court, which is addressing state law issues that may well moot this appeal or, at the very least, render any opinion of this Court advisory. For example, even in the unlikely event that this Court were to conclude that Wisconsin law would bind Respondents to the settlement between the State and the District although the State's prosecution fell far short of diligent, the district court could conclude, based on the full record compiled during its ongoing proceedings, that this case falls within Wisconsin's fairness exception to its res judicata doctrine. This Court's ruling would not even control the outcome of this case in that instance — and of course its holding would be subject to a subsequent contrary decision by the Wisconsin Supreme Court, which is the ultimate arbiter of the scope of Wisconsin's res judicata doctrine. Yet "if the same judgment would be rendered by the state [here lower] court after we corrected its views of federal laws, our review could amount to nothing more than an advisory

opinion." *Michigan v. Long*, 463 U.S. at 1041-42 (*quoting Herb v. Pitcairn*, 324 U.S. 117, 124-25 (1945)).

Furthermore, if the lower courts were to conclude on remand that the State's conduct constituted diligent prosecution sufficient to invoke the bar of Wisconsin's res judicata doctrine — though Respondents acknowledge that this is an unlikely outcome — then this Court's proceeding would prove moot as well. *Id.*; *see generally Benton v. Maryland*, 395 U.S. 784, 788 (1969) ("It is well settled that federal courts may act only in the context of a justiciable case or controversy."); *cf. Mills v. Green*, 159 U.S. 651, 653 (1895) (noting that an appellate court that had jurisdiction over an appeal when it was filed nevertheless must dismiss the appeal when subsequent events moot the appeal).

## II. The Judgment Below Does Not Conflict With Precedent From Other Circuits And Is Consistent With *Gwaltney*.

The court of appeals did *not* "adopt[] an interpretation of § 1365(b)(1)(B)'s diligent prosecution provision that requires the district court to second-guess the State's choice of remedy" (Pet. at 20) and consequently did *not* create any split among the circuits. To the contrary, the court of appeals expressly "recognize[d] that diligence on the part of the State is presumed." (Pet. App. at 23a.) Not a single court of appeals, however, has ever held that the presumption of diligence accorded the State is irrebuttable; such a holding would render the Clean Water Act's diligent prosecution requirement a nullity.

What the court of appeals actually did, therefore, was apply the proper legal standard for diligent prosecution to the unique factual record presented by this case. That record revealed a history of State enforcement so inept that the

District has not had to comply with its permit or the Act for more than two decades. (Pet. App. at 31a.) The factual record also revealed that the State, having failed to commence any enforcement proceeding against the District until after Respondents filed their citizen suit, hastily agreed to a settlement that effectively provided the District with another decade of relief from having to comply with its permit. (*Id.*) Specifically, the record below contained, among other proofs, the District's "own admission that the 2002 Stipulation is aimed at reducing, not eliminating, violations. . . ." (*Id.*) Even so, the court of appeals did not conclude as a matter of law that there was no diligent prosecution and therefore no res judicata; rather, it remanded to the district court for a more careful analysis of the diligence issue. (*Id.* at 32a-33a.)

The contention that, by citing to *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991), the court of appeals added to a circuit split and abandoned *Gwaltney of Southfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987), is just plain wrong. The court of appeals cited *Atlantic States* twice. First, it did so as authority for rejecting *Respondents'* argument that privity can never be established between a suing citizen and the State when the citizen suit precedes State enforcement. (Pet. App. at 22a n. 9.) Second, the court of appeals cited *Atlantic States* for the unremarkable proposition that courts may consider as one factor in assessing the diligence of a State prosecution "whether violations will continue notwithstanding the polluter's settlement with the government." (*Id.* at 31a.) The District surely does not complain of the former, and cannot locate a single case holding that the latter is not a proper factor to consider in assessing diligence.

As for *Gwaltney*, the District's repeated suggestion that the court of appeals has abandoned that decision is incorrect. (*See* Pet. at 12, 16, 20.) In fact, the court of appeals cites *Gwaltney* in support of its discussion of the reasons that the State is presumed to have acted diligently. (Pet. App. at 22a-23a.) But *Gwaltney* does not create an irrebuttable presumption that the State is diligently prosecuting a suit filed after commencement of a citizen suit that challenges ongoing violations; to the contrary, its hypothetical discussion focuses on whether citizens may file suit addressing past violations "months or years" after the Government concluded its enforcement as to those violations. 484 U.S. at 61. Hence, *Gwaltney* is quite different from this case. Indeed, here the court of appeals simply remanded to the district court with directions to determine whether the facts rebut the presumption of diligent prosecution. (Pet. App. A at 32a-33a.)

Similarly, the District's effort to portray a conflict among the circuits based on the decision below, on the one hand, and *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994) (*see* Pet. at 20-25) or *North & South Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552 (1st Cir. 1992) (*see* Pet. at 22-25), on the other, is equally incorrect. The court of appeals commenced its privity discussion with a quote from *Comfort Lake Ass'n v. Dresel Contracting*, 138 F.3d 351 (8th Cir. 1998), a case decided by the Eighth Circuit four years after its *Arkansas Wildlife* decision. (*See* Pet. App. at 21a.) *Arkansas Wildlife* is perfectly consistent with *Comfort Lakes* — indeed, both opinions were authored by Judge McMillian — and thus with the decision below as well. The court of appeals also cites *Scituate* with approval in its discussion of the presumption it was according the State in this case. (*See id.* at 24a.) In

other words, even though their outcomes may differ, all of these cases apply the same legal principles.

The District also tries unsuccessfully to demonstrate a circuit split using *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004). But *Ellis* cites with approval to *Atlantic States*, *see* 390 F.3d at 475 — the very decision that, the District claims, lured the court of appeals below into a circuit split with *Ellis*. Obviously, if both *Ellis* and the decision below rely on *Atlantic States*, they do not stand on opposite sides of a circuit split over whether *Atlantic States* misstates the law.

The court of appeals below reached an outcome different from that in these cases not because it was applying a different standard — and not even because it was applying the same standard differently — but rather because the underlying facts of this case are different from the facts in those cases in many outcome-determinative ways. The *Arkansas Wildlife* decision is a perfect illustration. That case differs from this in no fewer than four key particulars, each of which would justify a different outcome under the same law. First, Arkansas law allowed the *Arkansas Wildlife* plaintiff to intervene as of right in the State's action, which is consistent with the federal scheme. 29 F.3d at 381. Plaintiffs in this case, however, had no such comparable right under Wisconsin law. Second, the administrative order at issue in *Arkansas Wildlife* actually required compliance with the law, whereas here the State has not required the District to comply with its permit or the law. *Id.* at 378. Third, in *Arkansas Wildlife* the plaintiff was allowed limited jurisdictional discovery — a necessary benefit the district court denied Plaintiffs. *Id.* Fourth, the Arkansas state agency actually imposed civil monetary penalties against the violating entity; here the State has never penalized the

District for its repeated SSOs. *Id.* There is, therefore, no conflict of law for this Court to address.

Ultimately, the court of appeals was not even directly addressing federal law here. (Pet. App. A at 22a.) Rather, it was seeking guidance from federal law on the state law issue of privity under Wisconsin's doctrine of res judicata. Consequently, the decision below does not have a direct impact on the development of what constitutes diligent prosecution under federal law. Moreover, because it addresses state law, this decision remains subject to rejection by the Wisconsin Supreme Court. Review by this Court would be pointless.

Perhaps most important, the decision below was forged in the furnace of the factual record before the lower courts. The State's lax conduct here overcame the presumption favoring the State, at least at the dismissal stage, thus requiring a remand to develop a fuller factual record. The facts — at least as known at this preliminary stage — do not make this case an appropriate vehicle for making legal decisions of broad and general import. *See Taggart v. Weinacker's Inc.*, 397 U.S. 223, 225 (1970) (dismissing certiorari as improvidently granted where the legal question was "overshadowed by special facts of the case").

## CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 04-889

IN THE

# Supreme Court of the United States

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
*Petitioner,*

v.

FRIENDS OF MILWAUKEE'S RIVERS AND
LAKE MICHIGAN FEDERATION,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF FOR PETITIONER

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## RULE 29.6 STATEMENT

The Rule 29.6 Statement in the petition is current.

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IN THE

# Supreme Court of the United States

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,
*Petitioner,*

v.

FRIENDS OF MILWAUKEE'S RIVERS AND
LAKE MICHIGAN FEDERATION,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## REPLY BRIEF FOR PETITIONER

**1. Respondents' Opposition to Certiorari Does Not Address the Critical Reasons Why the Court Should Grant the Petition.** First, the Seventh Circuit has misconstrued the Clean Water Act to allow citizen plaintiffs to litigate alleged violations, even after the State litigates the same conduct and obtains a final order requiring substantial remedial relief. According to the court of appeals, citizen plaintiffs may collaterally attack such government enforcement until a federal court determines that the government's choice of remedies ensures that there is no "realistic prospect" of future violations—the standard the court of appeals held must be met under the Act's "diligent prosecution" provision. The court of appeals reached this conclusion by holding that citizens cannot be in privity with the government for res judicata purposes unless the government's prosecution of alleged violations satisfies the no-realistic-prospect standard. In reading the Act to create this federal res judicata limitation, the court of appeals failed to apply state law, as required by 28 U.S.C. § 1738, and created a conflict with the Eighth Circuit's deci-

sion in *EPA v. Green Forest*, 921 F.2d 1394, 1404 (8th Cir. 1990), which held that the Act puts citizens in privity with government enforcers by making the citizens "private attorneys general." This conflict over the Act's proper construction and the preclusion rules applicable in citizen suits warrants this Court's resolution.

Second, the court of appeals' construction of the Act's diligent prosecution provision to allow citizen suits unless the government's enforcement leaves no "realistic prospect" of future violations expands the scope of citizen suits under the Clean Water Act, as well as under a host of other federal environmental statutes, all of which have similar diligent prosecution provisions. *See* Pet. 11, n.3. The Seventh Circuit's construction conflicts with decisions of the First, Sixth, and Eighth Circuits, which have held, consistent with *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49 (1987), that the government has "diligently prosecuted" if it has sought enforcement against alleged violations and prevailed. This conflict over the proper interpretation of this crucial environmental law enforcement provision independently warrants granting the petition.

**2. None of Respondents' Five Arguments for Denying Review Has Merit.**

**a. The Seventh Circuit held that the Clean Water Act's diligent prosecution provision itself determines whether citizen plaintiffs are in privity with the State for claim preclusion purposes.** Respondents contend that the decision below is limited to construing state law. Br. in Opp'n 15-19. But the court of appeals' resort to federal law could not have been clearer:

> [I]n order for the state agency to be in privity with the public's interests, the state's subsequently-filed government action must be a diligent prosecution. . . .**We look to the language of the Act to find out what is meant by "diligent prosecution."** Citizens' suits are barred "if

> the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State *to require compliance with the standard, limitation, or order*." 33 U.S.C. § 1365(b)(1)(B) (emphasis added).

Pet. App. 22a (italics in original, bold added).

Respondents entirely ignore this passage, though it is the linchpin in the court of appeals' holding that no citizen suit is barred by government enforcement unless a federal court first conducts a "detailed examination" of the government's remedy and then concludes that it leaves no "realistic prospect" of future violations (*see* Pet. App. 33a). Thus, while the court of appeals said that it was applying Wisconsin res judicata law, its decision in fact relies on federal law to resolve the dispositive preclusion issue, *viz.*, whether citizen plaintiffs are in privity with the State. The court of appeals created a novel and unworkable federal rule: No State can be in privity with citizen plaintiffs unless the State's enforcement meets the no-realistic-prospect standard for the Act's diligent prosecution provision. As the petition explains (at 14-15), in addition to misconstruing the Act, this reasoning contravenes the full faith and credit statute, 28 U.S.C. § 1738.

Respondents' argument that the decision below only applies Wisconsin law (Br. in Opp'n 15-17) mischaracterizes it. The decision in fact does not reference a single Wisconsin authority in deciding whether respondents were in privity with the State, instead relying on eleven federal cases and two law review articles discussing the Clean Water Act's diligent prosecution bar. *See* Pet. App. 21a-32a. Contrary to respondents' suggestion, therefore, review of the decision would not require the Court to examine Wisconsin law. The substantial, recurring questions of federal law that warrant this Court's resolution are whether the court of appeals properly resorted to federal law to decide whether this suit is barred, and, if so, whether it applied the correct statutory standard.

**b. The court of appeals' remand to the district court does not threaten to make a decision by this Court moot.** The Seventh Circuit remanded this case to the district court to apply its newly-created federal law preclusion principle. That principle first requires the district court to make a "detailed examination" (Pet. App. 33a) of the over $900 million of planned system improvements required by the State in the state court consent decree and then to predict whether there will be no "realistic prospect that violations due to the same underlying causes . . . will continue after these planned improvements are completed" (*id.*).

Understanding the message, the district court has ordered "the parties to submit a proposed discovery schedule and a proposal for future proceedings to enable [it] to determine whether the system inadequacies of the Milwaukee Metropolitan Sewerage District will be corrected by the improvements addressed by the 2002 Stipulation and Settlement Agreement between the State of Wisconsin and MMSD set forth in a consent decree heretofore entered by the Milwaukee County Circuit Court." Order, Dec. 2, 2004, 4. The parties are currently conducting this discovery. The parties have informed the district court that the completion of lay and expert depositions will not occur before July 29, 2005. Joint Proposed Disc. Sched., Dec. 27, 2005, 2. Although the parties disagree on whether an evidentiary hearing will be required, neither party has proposed that they submit the matter to the district court before August 15, 2005. *Id.* at 3. Consequently, the dispute created by the court of appeals is almost certain not to be concluded before next fall, at the earliest.

Additionally, while the district court denied petitioner's request to stay the matter pending disposition of a petition for a writ of certiorari, it did so in part because "there is no[] assurance that a writ of certiorari will issue." Order, Dec. 2, 2004, 3. Should this Court grant the petition, the court would presumably await this Court's decision. Accordingly, respondents' suggestion that the district court might resolve

this case and render it moot before this Court can review the court of appeals' judgment is not well founded.

More importantly, the district court's mandated inquiry into the bona fides of the State's enforcement efforts and the future effectiveness of its remediation plan causes exactly the interference with government enforcement and drain on resources that have led other courts of appeals to prohibit citizen suits that collaterally attack final government enforcement orders. *See* Pet. 20-25. That the decision below results in this ongoing harm weighs in favor of, rather than against, granting the petition.

**c. The district court's possible application of Wisconsin's "fairness exception" to res judicata will not render a decision by this Court advisory.** Respondents suggest (at Br. in Opp'n 18-19) that review is not warranted because the court of appeals instructed the district court to consider "Wisconsin's fairness exception to the res judicata doctrine" (Pet. App. 33a). But, as the court of appeals' decision makes clear, application of res judicata principles—and thus analysis of whether respondents are in privity with the State—must logically come first. It is this privity analysis that the Seventh Circuit improperly federalized and used as the foundation for judicial usurpation of the Clean Water Act's enforcement authority. *See id.* 32a-33a.

What is more, Wisconsin's fairness exception only applies in "special circumstances," absent here, in which the public policies favoring preclusion of a second action for the same claim are overcome by an extraordinary reason (the only reason the Wisconsin Supreme Court has ever recognized is to avoid precluding a person who sued to recover for non-malignant asbestos injuries from recovering for later-developing malignancies). *See Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 601 N.W.2d 627, 638-39 (1999). Because the citizen suit is a creation of the Clean Water Act, consideration of this "narrow exception," *id.* at 639, would require the district court to examine the Act's en-

forcement provisions, its structure, and its purpose in providing for citizen enforcement. As a result, its application would necessarily be intertwined with issues raised in the petition—*e.g.*, the primacy of government enforcement under the Act and the deference owed to a state enforcement agency's choice of remedies. Thus, the district court's possible consideration of the fairness exception does not militate against review.

**d. The decision conflicts with *Gwaltney* as well as with decisions from other courts of appeals.** Of course, *Gwaltney* did not create "an irrebuttable presumption" barring citizen suits following government enforcement. Br. in Opp'n 21. But respondents cannot dispute—and thus do not mention—*Gwaltney*'s instruction that the citizen suit's proper role is "interstitial," not "intrusive." 484 U.S. at 61. By requiring the district court to determine whether the State's court-ordered remediation projects ensure compliance with the Act, the Seventh Circuit's decision, like the Second Circuit's decision in *Atlantic States Legal Foundation, Inc. v. Eastman Kodak Co.*, 933 F.2d 124 (2d Cir. 1991), legitimizes intrusive citizen suits that *Gwaltney* held Congress did not intend.[1]

The error in respondents' denial that the decision below conflicts with decisions of the First, Sixth, and Eighth Circuits is made apparent by their failure to discuss any of those decisions' rationales. Instead, respondents concede that these decisions' "outcomes may differ" (Br. in Opp'n 22), but suggest that the difference results from the application of the "same legal principles" (*id.*) to different facts. Nothing could be further from the truth. Even cursory review of these deci-

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[1] Although respondents make much of the court of appeals' failure to cite *Atlantic States* in narrowly construing the Act's diligent prosecution standard, there is no denying that the Seventh Circuit adopted the Second Circuit's language—requiring a determination that state-ordered remedies leave no "realistic prospect" of future violations. *Compare Atl. States*, 933 F.2d at 127, with Pet. App. 33a.

sions reveals a principled conflict with the decision below: the decision below (like *Atlantic States*) allows citizen suits to proceed unless government enforcement leaves no "realistic prospect" of future violations, while the First, Sixth, and Eighth Circuits have ruled that, when the government secures affirmative relief, it precludes tag-along citizens' suits. *See* Pet. App. 20-25; *see also* AMSA *Amicus Curiae* Br. 5-11.

Rather than make any effort to reconcile the decision below with the First, Sixth, and Eighth Circuits' interpretation of the citizen suit provision, respondents principally resort to contending that there is no conflict because the decision below cites these decisions or, in one instance, cites a decision written by the same judge who wrote one of these decisions. *See* Br. in Opp'n 17, 21-22. Regardless, as the petition explains (at 20-25), unlike the decision below, none of these courts would give citizen plaintiffs license to litigate alleged violations resolved by government enforcement—reined in only if a federal court makes an independent examination of the government's remedy and determines that the remedy leaves no realistic prospect of a future violation. Although the petition features this point prominently, respondents never contest it.

Respondents' only other attempt to harmonize the Seventh Circuit's decision with the conflicting decisions from these three courts of appeals is to suggest that two of the Eighth Circuit's decisions have materially different facts (ignoring altogether the substance of the decisions from the First and Sixth Circuits). First, respondents quote *EPA v. City of Green Forest*'s suggestion that "'there may be some cases in which it would be appropriate to let a citizens' action go forward in the wake of a subsequently-filed government enforcement action.'" Br. in Opp'n 17 (quoting *Green Forest*, 921 F.2d at 1404). They then contend that their allegations against petitioner make this "such a case." Br. in Opp'n 17. But, in so contending, respondents simply disregard *Green Forest*'s holding that only "where . . . the Government fails

or declines to take action, [does] the [Clean Water Act] allow[] citizens acting as private attorneys general to fill the void." 921 F.2d at 1405. Respondents do not (and could not) suggest that the State in this case "failed to take action." Under *Green Forest*'s construction of the Act, the district court's dismissal of respondents' action was proper.

Respondents also attempt to cabin the Eighth Circuit's *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), decision within its facts. Br. in Opp'n 22-23. But, as the petition explains (at 23-24), it is *Arkansas Wildlife*'s rationale that is in conflict with the decision below. The Eighth Circuit reasoned that (1) citizen suits "are proper only when the federal, state, or local agencies fail to exercise their enforcement responsibility," *Arkansas Wildlife Fed.*, 27 F.3d at 380, and (2) it would be inappropriate "to find failure to diligently prosecute simply because . . . a compromise was reached," *id.* Respondents fail even to mention—let alone confront—these propositions, which, if applied in this case, would require a different outcome.

**e. Respondents' extensive (and inaccurate) factual aspersions demonstrate why this Court should grant—rather than deny—the petition.** Respondents devote well over half of their brief to describing general harms from sanitary sewer overflows, contending that petitioner has been out of compliance with its permit both before and after the State's enforcement, and characterizing the State's enforcement as "lax." Br. in Opp'n 2-12, 23. Respondents' story is rife with intentionally inflammatory statements that are, at best, misleading. Respondents contend, for example, that petitioner has "discharged over 13 billion gallons of untreated sewage and storm water" (Br. in Opp'n 6)—a statement that conveniently ignores the fact that ninety-three percent of this volume consisted of permitted overflows (S. App. 233) that respondents have never asserted were illegal. The remainder was the subject of the State's investigation and lawsuit.

Respondents' tactic—and the success of that tactic in the court of appeals—underscores the need for this Court's review. Neither in their opposition brief nor at any other time have respondents claimed that the State's $900 million remedial program—a program approved by the EPA and commented on by respondents before being entered as a state court consent decree—is deficient for failing to require any specific corrective measure. The only specific remedy respondents claim is that the government failed to require penalties. Br. in Opp'n 9. But, as this Court has made clear, government enforcers must be entitled to forgo penalties to secure agreements on costly corrective measures, such as, in this case, building new facilities that increase sewer capacity. *Gwaltney*, 484 U.S. at 61.

Additionally, as *amici* have explained, if the types of allegations respondents make suffice to allow citizens to sue after a remediation agreement has been reached with government enforcement agencies, then sewerage districts (and other permitted dischargers) across the nation will have substantially less to gain by resolving alleged violations with the government. *See* AMSA *Amicus Curiae* Br. 15-16; *Amicus Curiae* Br. of CSO P'ship 15-16. This is no minor issue. For example, at the time of the Wisconsin Legislative Audit Bureau Report referenced by respondents, Boston, Detroit, St. Louis, Pittsburgh, Cleveland, and Portland each averaged more than forty overflows a year caused by wet weather. S. App. 00297. In contrast, since a deep tunnel became operational in 1994, petitioner's average annual number of overflows caused by wet weather has been fewer than four—a record that simply does not support respondents' repeated aspersions on petitioner and the State's regulators.

Under the decision below, even districts that agree to spend millions, if not billions, on new facilities and other compliance measures (as petitioner did here) will remain at risk of having to defend against costly citizen suit litigation over the same alleged violations. The Seventh Circuit's interpretation

of the citizen suit provision means that none of those suits can be dismissed without discovery and federal court proceedings to determine whether the government's enforcement leaves no "realistic prospect" of future violations. In addition to the threat of paying penalties and paying the citizen plaintiffs' attorneys' fees, this risk of duplicative citizen suit litigation will serve to make negotiated government enforcement of the environmental laws more costly and far less appealing.

The decision below thus creates bad public policy that neither the Clean Water Act nor any other environmental statute contemplates. As this Court made clear in *Gwaltney*, federal and state governments are the primary enforcers of the federal environmental laws. Citizen suits are to fill the gap when governments make *no* enforcement effort. By upsetting this allocation of responsibility, the decision below will generate duplicative litigation for permitted dischargers and make routine the second-guessing of government regulators by citizen action groups and federal courts.

## CONCLUSION

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 04-889

# In The Supreme Court of the United States

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

*Petitioner,*

v.

FRIENDS OF MILWAUKEE'S RIVERS AND LAKE MICHIGAN FEDERATION,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES AND THE CALIFORNIA ASSOCIATION OF SANITATION AGENCIES IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37 of this Court, the Association of Metropolitan Sewerage Agencies ("AMSA") and the California Association of Sanitation Agencies ("CASA") respectfully request leave to file the attached *amicus curiae* brief in support of Petitioner. Consent for participation was requested of all parties, but was denied by Respondents Friends of Milwaukee's Rivers and Lake Michigan Federation.

AMSA is a trade association that represents the interests of nearly 300 publicly-owned wastewater treatment agencies nationwide. Collectively, AMSA member agencies serve the majority of the sewered population in the United States, and treat and reclaim more than 18 billion gallons of wastewater each day. CASA is a California non-profit Public Benefit Corporation created to further the common interests of 110 small, medium and large publicly-owned wastewater collection, treatment and reclamation agencies located within the State of California in their effort to provide the cost-effective treatment, disposal, reclamation and reuse of wastewater. AMSA's and CASA's members are dedicated to preserving public health and promoting sound environmental stewardship.

The primary question before the Court is whether a state court order reflecting the agreed resolution of Clean Water Act ("CWA") violations is subject to independent review through a separate citizen suit brought in federal court. AMSA's and CASA's members have a substantial interest in the correct resolution of this issue because it will directly impact the integrity of settlements that they enter into with their regulators. As public wastewater treatment agencies, AMSA's and CASA's members are entrusted with the responsibility of protecting public

health through effective environmental management. However, despite their regulatory role, these entities are simultaneously governed by the many rules and restrictions of the CWA and required to hold CWA discharge permits. These public entities are subject to enforcement under the CWA and frequently resolve these enforcement matters through agreements with state regulators. AMSA and CASA are concerned that the Seventh Circuit's failure to give the proper degree of deference to state enforcement actions, and state court orders implementing those actions, seriously undermines their viability as a means of resolving CWA violations and will, in turn, impact the ability of AMSA's and CASA's member agencies to protect public health and the environment.

The attached *amicus curiae* brief will assist the Court in evaluating the complex legal and technical issues presented in the petition for certiorari. This brief also draws on the decades of experience gained by AMSA and CASA through the representation of their members to provide the Court with a unique perspective on the practical concerns created by the Seventh Circuit's alteration of the basic relationship between enforcement and citizen suits under the CWA. Given the ramifications of this case for their members, AMSA and CASA respectfully request leave to file the attached brief *amicus curiae* in support of Petitioner.

Respectfully submitted,

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## BRIEF OF THE ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES and THE CALIFORNIA ASSOCIATION OF SANITATION AGENCIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER[1]

### INTEREST OF *AMICI*

As detailed in the attached motion, AMSA and CASA represent the interests of several hundred small, medium and large wastewater treatment agencies throughout the United States. These public entities are entrusted with the crucial service of collecting, treating and reclaiming wastewater while simultaneously protecting the environment.

A central function of AMSA and CASA is the representation of their members' legislative, regulatory and environmental interests. As a result, AMSA and CASA actively participate in litigation that raises important CWA implementation and policy issues. The case before the Court involves sewer overflows, an issue which AMSA's and CASA's members take very seriously. Their collective goal is to provide the highest level of treatment available thereby maximizing the protection of public health and, ultimately, eliminating such overflows entirely. The primary legal question before the Court is whether a state court order reflecting the agreed resolution of CWA violations is subject to independent review through a separate citizen suit brought in federal court.

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[1] Pursuant to Rule 37.6 of this Court, *amici* represent that counsel for *amici* authored this brief in its entirety and that no person or entity other than *amici* and their representatives made any monetary contribution to the preparation or submission of this brief.

AMSA's and CASA's members have a substantial interest in the correct resolution of this issue because it will directly impact the integrity of settlements that they enter into with their regulators. As public wastewater treatment agencies, AMSA's and CASA's members hold National Pollutant Discharge Elimination System (NPDES) permits and are governed by the many other rules and restrictions of the CWA. These public entities are subject to enforcement under the CWA and frequently resolve CWA enforcement matters through agreements with their state regulators. AMSA and CASA are concerned that the Seventh Circuit's failure to give the proper degree of deference to state enforcement actions and related court orders will undermine their viability as a means of resolving CWA violations.

## STATEMENT OF THE CASE

*Amici* adopt the statement of the case contained in Petitioner's brief.

## SUMMARY OF THE ARGUMENT

Congress expressly entrusted states with the primary authority to enforce the CWA. It then granted citizens *supplemental* enforcement rights. Consistent with this structure, this Court and the majority of circuit courts have carefully limited citizen suits to their proper role by providing substantial deference to state enforcement efforts. In sharp contrast, the minority position adopted by the Seventh Circuit below would replace this deferential standard with a "detailed examination" of state-selected

remedies through federal court hearings regarding whether there is a "realistic prospect" of continuing violations. This enables citizen suits to challenge the enforcement decisions of state agencies – a direct contradiction of Congress' intent that they play a strictly supplemental role.

In addition to contradicting Congress' plan, the Seventh Circuit's failure to give state enforcement the requisite deference will expand the already alarming abuse of citizen suits. Recent Congressional testimony by AMSA, CASA and others establishes that the dramatic increase of citizen suits comes at a huge cost to the public and the environment. Abusive citizen filings thrive in jurisdictions where courts fail to grant the requisite deference to government enforcement. Allowing citizen suits where adequate government enforcement exists, as the Seventh Circuit would, ultimately results in duplicative liability, needless litigation and waste of finite public resources. Further, allowing citizens to collaterally undermine state enforcement efforts in federal court will actually delay needed improvements and discourage necessary wastewater treatment innovation. Thus, the conflict among the circuits exacerbated by the Seventh Circuit's opinion below presents an issue of national import that warrants proper resolution by this Court.

## ARGUMENT

### I. THE SEVENTH CIRCUIT'S FAILURE TO EXTEND THE REQUISITE DEFERENCE TO STATE ENFORCEMENT ACTIONS CONTRADICTS THE CLEAN WATER ACT'S TEXT, DISREGARDS CONGRESS' INTENT AND EXACERBATES AN EXISTING CONFLICT AMONG CIRCUIT COURTS.

#### A. Congress Granted Citizen Suits Only a Limited, Supplemental Role In Clean Water Act Enforcement.

Congress intentionally vested the states with primary enforcement authority under the CWA, explicitly stating that: "It is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution. . . . " 33 U.S.C. §1251(b). The relationship between this primary enforcement authority and the alternate role to be played by citizen suits is established in 33 U.S.C. §1365 which bans citizen suits (1) prior to the provision of 60-days notice and (2) where the federal or state government is "diligently prosecuting" an enforcement action. As recognized by this Court, Congress crafted these restrictions to ensure that citizen suits would play a secondary role in CWA enforcement. *See Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 60 (1987) ("The bar on citizen suits when governmental enforcement action is under way suggests that the citizen suit is meant to supplement rather than to supplant governmental action.").

This basic relationship is borne out in the legislative history. As this Court has acknowledged:

> The legislative history of the Act reinforces this view of the role of the citizen suit. The Senate Report noted that "[t]he Committee intends the great volume of enforcement actions [to] be brought by the State," and that citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility."

*Gwaltney* at 60 (quoting S. REP. NO. 92-414, p. 64 (1971)). This same Senate Report quoted in *Gwaltney* further provides that the restrictions on citizen suits were actually crafted "to further encourage and provide for agency enforcement. . . ." *Id.* at 79. Similarly, the U.S. EPA testified to Congress that these restrictions on the filing of citizen suits were needed to "discourage unnecessary or abusive use of the citizen suit device." *Fed. Water Pollution Control Act Amend. of 1972: Hearing on S. 75 et seq. Before the S. Subcomm. on Air and Water Pollution*, 92nd Cong. 69 (1971) (Letter from William Ruckelshaus, Administrator, U.S. EPA).

### B. The Majority of Circuit Courts Limit Citizen Suits to Their Proper Role by Viewing Governmental Enforcement Efforts with Substantial Deference.

Most circuit and lower courts have adopted deferential interpretations of the CWA's citizen suit provision that fit with Congress' plan to put primary enforcement authority squarely in governmental hands. For example, in *North and South Rivers Watershed Ass'n v. Town of Scituate*, 949 F.2d 552 (1st Cir. 1991), the State of Massachusetts ordered a town to: (1) prohibit new connections to its sewer system, (2) take all steps necessary to construct new

wastewater treatment facilities and (3) begin upgrading their facility. *Id.* at 553-54. While the town was in the process of complying with this order, a citizens' group brought suit arguing that this was "diligent non-prosecution." *Id.* at 557. The First Circuit rejected this invitation to second-guess Massachusetts' chosen enforcement scheme, instead indicating that it was entitled to substantial deference, stating that, "[w]here an agency has specifically addressed the concerns of an analogous citizen's suit, deference to the agency's plan of attack should be particularly favored." *Id.*

Two Eighth Circuit opinions similarly give the requisite deference to state enforcement efforts. In *Arkansas Wildlife Federation v. ICI Americas, Inc.*, 29 F.3d 376 (8th Cir. 1994), a citizens' group challenged the diligence of enforcement where the State of Arkansas required a herbicide manufacturer to take remedial actions through an administrative order. Specifically, the citizen plaintiffs argued that Arkansas had "repeatedly and unnecessarily abandoned all of its enforcement powers, failed to address ICI's violations, gave ICI repeated extensions for compliance, and assessed insignificant amounts of civil penalties. . . ." *Id.* at 380. The Eighth Circuit rejected these arguments because "such suits are proper only when the federal, state, or local agencies fail to exercise their enforcement responsibility [and] should not considerably curtail the governing agency's discretion to act in the public interest." *Id.* at 380-81 (citing *Gwaltney*, 484 U.S. at 60-61 and *Scituate*, 949 F.2d at 557).

Similarly, in *Comfort Lake Assoc., Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351 (8th Cir. 1998), a conservation group sued a contractor for alleged permit violations. In finding that these claims were barred by the settlement

of a state administrative action, the court noted that "as a final agency enforcement action, that Agreement is entitled to considerable deference if we are to achieve the Clean Water Act's stated goal of preserving 'the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution.'" *Id.* at 357 (citing 33 U.S.C. §1251(b)).

Precedent under the parallel citizen suit provisions in other environmental statutes further confirms that substantial deference to government enforcement is required. For example, in *Ellis v. Gallatin Steel Co.*, 390 F.3d 461 (6th Cir. 2004), citizens sued a steel manufacturer under the Clean Air Act, alleging violations that were resolved in a government consent decree.[2] The district court endorsed the decree but also provided additional injunctive relief to the citizens. *Id.* at 469. On appeal, the Sixth Circuit resoundingly rejected this collateral attack on the government's remedial strategy:

> Such second-guessing of the EPA's assessment of an appropriate remedy – a mere three months after the entry of the decrees – fails to respect the statute's careful distribution of enforcement authority among the federal EPA, the States and private citizens, all of which permit citizens to act where EPA has "failed" to do so, not where EPA has acted but has not acted aggressively enough in the citizens' view.

*Id.* at 477 (citing *Gwaltney*, 484 U.S. at 61).[3]

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[2] The citizen suit provision in the Clean Air Act is identical to the one before the Court here in all material respects. *See* 42 U.S.C. §7604.

[3] A substantial number of lower courts have also endorsed the majority position that the CWA mandates deference to public enforcement efforts. *See, e.g., Atl. States Legal Foundation, Inc. v. Hamelin,*

(Continued on following page)

### C. The Minority View Adopted by the Seventh Circuit Impermissibly Expands the Role of Citizen Suits by Failing to Give Proper Deference to Prior Governmental Enforcement.

The Seventh Circuit opened its analysis in the present case by stating that "diligence on the part of the State is presumed" and reciting two of the well-accepted reasons for that rule: (1) "the intended role of the State as the primary enforcer of the Clean Water Act" and (2) that "courts are not in the business of designing, constructing or maintaining sewage treatment systems." Appendix to Petition ("Pet. App.") 24a. However, its ultimate decision discarded these concepts entirely. The Seventh Circuit first characterized Wisconsin's chosen remedy as "the potentially self-serving statements of a state agency and the violator with whom it settled." *Id.* This characterization suggests a *highly skeptical*, rather than a highly

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182 F. Supp. 2d 235, 246 (N.D. N.Y. 2001) ("[t]he standard for evaluating the diligence of the state in enforcing its action is a low one which requires due deference to the state's plan of attack"); *Comm. of Cambridge v. City of Cambridge*, 115 F. Supp. 2d 550, 554 (D. Md. 2000) (Plaintiffs' burden of proving that a state's prosecution is not diligent "is a heavy one because diligence on the part of the enforcement agency is presumed"); *Penn. Envt'l Defense Foundation v. Borough of North East*, 1997 U.S. Dist. LEXIS 23865 at *34 (W.D. Penn. Dec. 31, 1997) ("a State may choose to forgo heavy penalties and immediate compliance in lieu of requiring costly long-term improvements to a polluter's facilities"); *Williams Pipeline Co. v. Bayer Corp.*, 964 F. Supp. 1300, 1324 (S.D. Iowa 1997) ("the CWA calls for a more deferential approach that does not circumscribe the administrator's discretion") (internal quotations omitted); *Coastal Fisherman's Ass'n v. Remington Arms Co.*, 777 F. Supp. 173, 183 (D. Conn. 1991) ("court[s] must presume the diligence of the state's prosecution of a defendant absent persuasive testimony that the state has engaged in a pattern of conduct in its prosecution that could be considered dilatory, collusive or otherwise in bad faith").

deferential, approach. The Seventh Circuit ultimately mandated that the lower court, after giving "some" deference to the judgment of the state, perform its own "detailed examination" to prove that Wisconsin's enforcement plan leaves no "realistic prospect" of "violations due to the same underlying causes." Pet. App. 33a. This result places citizens squarely in the middle of the state's enforcement case thus failing to preserve the state's role as "primary enforcer."

The Seventh Circuit's approach also contradicts its own advice that courts should avoid entering the "business of designing, constructing or maintaining sewage treatment systems." Pet. App. 24a. Instead, its decision to conduct an after-the-fact "detailed examination" of Wisconsin's enforcement plan does just that. At the Seventh Circuit's direction, a federal court would be required to evaluate the technical soundness of Wisconsin's settlement with the Milwaukee Metropolitan Sewerage District to determine whether it will conclusively solve the problems addressed. In other words, it would require that court to determine whether the State agency's engineering decisions (which are based on its substantial expertise and long experience with the system at issue) were wrong. This goes far beyond the limited role that the Seventh Circuit conceded should apply – determining whether state enforcement activity was "dilatory, collusive, or otherwise in bad faith." Pet. App. 23a (quoting *Connecticut Fund for the Env't v. Contract Plating Co.*, 631 F. Supp. 1291, 1293 (D. Conn. 1986).[4]

[4] This effectively reverses, without any explanation, the Seventh Circuit's much more deferential analysis under RCRA's substantively identical citizen suit provision in *Supporters to Oppose Pollution, Inc. v.*

(Continued on following page)

The Seventh Circuit is not alone in conducting an in-depth reexamination of state enforcement proceedings in contravention of Congressionally-mandated deference to the states. The Second Circuit has also expressed a similar view that advanced inquiry into state enforcement actions is warranted to determine "whether violations will continue notwithstanding the polluter's settlement with the government." *Atl. States Legal Foundation, Inc. v. Eastman Kodak*, 933 F.2d 124, 127-28 (2d Cir. 1991).[5] The Ninth Circuit has also espoused a narrow reading of the citizen suit bar in CWA §309(g) on at least two occasions. *See Washington Public Interest Research Group v. Pendleton Woolen Mills*, 11 F.3d 883 (9th Cir. 1993) (narrowly construing the requirement in 33 U.S.C. §1319(g)(6)(A)(i) that a preclusive enforcement action must be brought "under this subsection"); and *Citizens for a Better Environment v. Union Oil Co.*, 83 F.3d 1111 (9th Cir. 1996) (adopting an extremely narrow reading of the "comparable state law" requirement in 33 U.S.C. §1319(g)(6)(A)(iii)). In doing so, like the Second and Seventh Circuits, it rejected the deferential approach reflected in the First Circuit's *Scituate* opinion, "which was grounded in that court's concern that the discretion of enforcement authorities to choose enforcement methods be preserved." *Washington*

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*Heritage Group*, 973 F.2d 1320 (7th Cir. 1992). In that case, the Seventh Circuit held that "public agencies' litigation decisions may not be second-guessed by the device of filing an independent suit," and confirmed that "[p]rimary responsibility lies with public enforcers." *Id.* at 1324.

[5] A distinct minority of lower court opinions supports this theory. Many of those are from lower courts in the Second Circuit and, therefore, bound by its decision in *Atlantic States*. *See, e.g., New York Coastal Fisherman's Ass'n v. New York City Dep't of Sanitation*, 772 F. Supp. 162, 168 (S.D. N.Y. 1991).

*Public Interest Research Group*, 11 F.3d at 885; *Citizens for a Better Environment*, 83 F.3d at 1117.

The Second and Seventh Circuits' interpretation of the "diligent prosecution" requirement, and the Ninth Circuit's narrow construction of the other elements of the citizen suit bar, stand in marked contrast to the deferential standard adhered to in the First, Sixth and Eighth Circuits. The latter effectively gives state remedies the time and opportunity they need to work. While this does require some patience by citizen groups, by no means does it deny them their ultimate right to ensure that violations cease. Rather, these groups are simply kept from "jumping the gun" before it is known whether the state's selected remedy will be effective. If the violations continue after the remedy has been implemented, then the need for enforcement action resumes and citizen suits may be brought. In contrast, the less deferential approach would allow citizen suits to challenge the efficacy of the often complex fixes to water quality problems immediately – before they are given the chance to work. This is, consequently, a clear and direct conflict among the circuits which demands this Court's attention. Unless corrected by this Court, the Seventh Circuit's recent decision will undermine the intent of Congress that citizen suits should "supplement" rather than "supplant" governmental action and will further contribute to the disturbing trend towards protracted and duplicative litigation described below.

## II. THE DECISION BELOW AND THE ASSOCIATED CONFLICT AMONG CIRCUIT COURTS WILL INTENSIFY THE ABUSE OF CITIZEN SUITS.

In recent years, there has been an alarming growth in the rate of citizen suit filings. Between 1978 and 1983, the Environmental Law Institute identified an annual average of 100 notices of intent to sue under all environmental statutes combined. ENVTL. L. INST., CITIZEN SUITS: AN ANALYSIS OF CITIZEN ENFORCEMENT ACTIONS UNDER EPA – ADMINISTERED STATUTES III-10 (1984). In contrast, according to a recent survey:

> Statistical trends show more citizen suits than ever. Since 1995, citizens have filed 426, or about one lawsuit a week . . . under the CWA and CAA alone. During the same period, under all environmental statutes, citizens have submitted more than 4,500 notices of intent to sue, including more than 500 and 4,000 against agencies and members of the regulated community, respectively. This is an astonishing pace over eight years of about two notices of intent to sue every business day.

James May, *Now More Than Ever: Trends in Environmental Citizen Suits at 30*, 2003 WIDENER L. REV., Issue 1 at 4. While many of these threatened and filed citizen suits presumably play the legitimate supplemental role that Congress envisioned, the vast experience of AMSA's and CASA's members shows that duplicative citizen litigation is commonplace.

On September 30, 2004, AMSA, CASA and others were invited to testify before the House of Representatives' Subcommittee on Water Resources and Environment to

address the concern "that some citizen suits do little or nothing to enhance water quality, because the suits involve violations that are already being addressed in an enforcement action with government regulators. . . ." *Are Citizen Suit Provisions of the Clean Water Act Being Misused? Before the House Comm. on Water Resources and Environment*, 108th Cong. (Sept. 30, 2004) (*Amicus* App. at 7). The Subcommittee explained that "the basis for these concerns are that such citizen suits have little or no economic or environmental value added, and the substantial transaction and settlement costs associated with such suits would divert funding from necessary infrastructure and environmental projects." *Id.*

The resulting testimony confirmed that the abuse of citizen suits is a real problem. Abusive citizen filings thrive in jurisdictions where courts fail to grant the requisite deference to government enforcement. Much of this recent activity has occurred in California under insufficiently deferential interpretations by the Ninth Circuit. *See, e.g., Citizens for a Better Environment*, 83 F.3d at 1117-19 (9th Cir. 1996) (refusing to recognize the equivalency of an EPA-approved California law for citizen suit preclusion purposes and requiring that a fiscal penalty has been assessed); *Knee Deep Cattle Co. v. Bindana Inv. Co.*, 94 F.3d 514 (9th Cir. 1996) (same).

AMSA's testimony regarding the recent problems in Los Angeles provides a perfect example. In that instance, the City of Los Angeles experienced several overflows during the Winter of 1998. *Amicus* App. at 16-19. The City's regulators initiated enforcement regarding these overflows and, during September of 1998, resolved the enforcement action with a Cease and Desist Order requiring the City to pay an $850,000 penalty and construct

major sewer projects costing more than $600,000,000. *Id.* at 17. However, despite this settlement, an activist group filed suit the very next month. *Id.*

This suit was held ***not*** to be precluded by the government's ongoing enforcement action because the citizen group alleged that future spills would occur. *Id.* at 17-18; *see also Knee Deep* at 516 (categorically deeming prior enforcement efforts insufficient to address ongoing violations); *Citizens for a Better Environment*, 83 F.3d at 1117-19 (9th Cir. 1996) (same). This overlapping enforcement "did not yield additional environmental benefit to the citizens of Los Angeles." *Id.* at 19. Rather, it cost the City: (1) almost $5,000,000 in attorneys' fees; (2) $2,000,000 in citizen attorneys' fees; (3) $800,000 in duplicative cash penalties and (4) $8,500,000 for supplemental projects. *Id.* Thus, the City of Los Angeles was forced to divert more than $16,000,000 in limited resources from needed improvement work.[6]

The Seventh Circuit's ruling below constitutes a significant step towards the creation of similar problems in Indiana, Illinois and Wisconsin. Instead of clearly informing potential citizen plaintiffs that state enforcement efforts will be honored absent proof of bad faith, they are now invited to initiate a collateral federal challenge

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[6] The other testimony described similar incidents impacting smaller California public bodies that were ultimately obligated to expend substantial sums on private litigation in lieu of providing public services. *See Amicus* App. at 21-32 (Testimony of CASA before Congress regarding citizen suit abuse against the Lake County Sanitation District, the City of Pacific Grove, the El Dorado Irrigation District, the City of Healdsburg and the City of Santa Rosa), and *Amicus* App. at 33-40 (Testimony of the City of Fort Bragg before Congress detailing the history of citizen suit abuse against the City of Fort Bragg).

questioning the factual sufficiency of state settlements. This will tend to move citizen suits in this area even further from the "interstitial" role proclaimed in *Gwaltney* and more squarely into the "potentially intrusive" role which the CWA and this Court have forbidden. *Gwaltney*, 484 U.S. at 61. This concern is not limited to the bounds of the CWA. Rather, as this Court recognized in *Gwaltney*, most of the principal environmental statutes contain nearly identical citizen suit provisions, including several that are remarkably similar to the one at issue here.[7] The Seventh Circuit's decision in this case, therefore, has the potential for a far-ranging impact on state enforcement activities across the entire spectrum of environmental law.

## III. THE SEVENTH CIRCUIT'S FAILURE TO EXTEND THE REQUISITE DEFERENCE TO STATE ENFORCEMENT WILL LEAD TO THE INEFFICIENT ENFORCEMENT OF THE CLEAN WATER ACT.

### A. The Seventh Circuit's Decision Will Discourage Settlement and Thus Increase Litigation Costs.

One fundamental concern is that the Seventh Circuit's new "detailed examination" standard will impair the ability of regulators and regulated parties alike to reach CWA settlements. As an initial matter, states will be less inclined to settle violations because every settlement – even those that are approved in a final judgment entered

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[7] *Gwaltney*, 484 U.S. at 57; *see, e.g.*, 42 U.S.C. §6972 (Resource Conservation and Recovery Act); 42 U.S.C. §7604 (Clean Air Act); 15 U.S.C. §2619 (Toxic Substance Control Act); 42 U.S.C. §11046 (Emergency Planning & Community Right to Know Act).

by state courts – will be open to independent factual review in federal court. The natural reaction of state regulators, particularly in large high-profile enforcement actions, will be to simply take settlement off the table as an option. The disincentive to settle that this lack of finality creates will similarly deter settlement by those regulated under the CWA because they cannot secure a firm agreement. Rather, even the most final settlement agreement will be at risk of subsequent revision by a federal court in response to a redundant citizen suit.

The inability to rely on settlements will have real costs. In many cases, regulators will be forced to pursue final court judgments through extended litigation. This additional litigation will come at the high cost described in AMSA's testimony before the House of Representatives. *See Amicus* App. at 19. Importantly, this increase in costs will not be borne exclusively by regulated entities but will also tap state resources as they either bear the burden of obtaining judgment or defending their settlements from collateral attack. Further, federal and state courts will be forced to handle this additional litigation despite increasingly clogged dockets.

As noted above, many of those regulated under the CWA are public entities entrusted with providing services essential to public health and the environment to their constituents. Subjecting these entities to the additional costs of increased litigation and needless attorneys' fees will necessarily result in the increased cost of basic services. In these situations, the additional expenditure of state funds will often find local taxpayers paying twice to fund litigation that otherwise could have been resolved more efficiently through settlement.

### B. The Seventh Circuit's Decision Will Delay Needed Improvements.

The primary benefit of citizen suits is their ability to force action where there is true environmental need but no enforcement activity. In that context, they can serve as a useful vehicle to help accomplish the CWA's goals. Ironically, allowing citizen suits to continue after the entry of final state settlements will have exactly the opposite effect. Upon entering a settlement agreement, the settling party is typically obligated to begin its remedial work in keeping with an approved schedule. However, a Seventh Circuit citizen suit that triggers a "detailed review" of an approved settlement's factual adequacy would necessarily forestall the needed improvements – perhaps for quite some time. Similarly, in those many instances where the parties choose litigation over a settlement that lacks finality, the conditions at issue will persist while litigation continues. This cannot be what Congress intended when creating the citizen suit right "[i]n order to further encourage and provide for agency enforcement. . . ." S. REP. NO. 92-414, p. 79 (1971).

### C. The Seventh Circuit's Decision Will Stifle Innovation.

The state and federal enforcement agencies tasked with the primary responsibility of ensuring CWA compliance have significant legal expertise gained through hundreds of enforcement actions under the CWA. Even more importantly, they have decades of experience with the complex dynamics of the specific wastewater systems that they regulate. Because of this expertise, these regulators should be entrusted with the crucial decision of setting optimal enforcement strategy. Protection of the

enforcement flexibility necessary to use this expertise was at the heart of this Court's warning that citizen suits may not "seek the civil penalties that the Administrator chose to forgo" where it instead required the installation of "particularly effective but expensive machinery." *Id.* at 61.

Requiring federal courts to conduct a "detailed examination" of state-ordered remedial plans and requiring a factual showing that these plans leave "no realistic prospect" of "violations due to the same underlying causes" substantially damages this scheme by forcing regulators to dramatically revamp their tactics. They will lose the flexibility to select innovative remedies which may well be effective, but are not yet proven. Similarly, they will not be able to use iterative approaches which allow the requisite flexibility to address the ever-evolving needs of growing communities. Instead, regulators would be limited to the subset of complete and traditional fixes which citizen groups believe satisfy the "no realistic prospect" standard. Thus, the Seventh Circuit's position will stunt the evolution of treatment technology and wastewater engineering practices and result in the less efficient provision of public services. In contrast, the appropriately deferential approach adopted by the majority of circuit courts encourages regulators to explore innovate solutions with the aim of improved effectiveness and efficiency.

## CONCLUSION

This case presents a clear conflict between the Circuit Courts of Appeals regarding the level of deference owed by federal courts to state-approved resolutions of CWA liability. Additionally, for the above reasons, it represents

an issue of substantial importance to all parties involved in the implementation of the CWA. It is thus appropriate for this Court to resolve the confusion created by the discordant opinions on this important issue.

For all the foregoing reasons, *amici* respectfully request that the petition for certiorari be granted.

Respectfully submitted,

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FEBRUARY 2005

**The Subcommittee on Water Resources and Environment**

**Hearing on**

**Are Citizen Suit Provisions of the Clean Water Act Being Misused?**

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## PURPOSE

On Thursday, September 30, 2004, at 10:00 a.m., in Room 2167 of the Rayburn House Office Building, the Subcommittee on Water Resources and Environment will hold a hearing on whether citizen suit provisions of the Federal Water Pollution Control Act (the "Clean Water Act" or the "Act") are being misused. The Subcommittee will receive testimony from representatives of two small communities in Northern California and from the City of Los Angeles about their experiences with lawsuits filed under the Clean Water Act's citizen suit provisions, and possibly from a representative of a public interest group.

## BACKGROUND

The Federal Water Pollution Control Act (the "Clean Water Act" or the "Act") makes unlawful the discharge of pollutants into navigable waters, unless the discharge is authorized by, and in compliance with, a National Pollution Discharge Elimination System (NPDES) permit issued by the U.S. Environmental Protection Agency (EPA) or by a State under a comparable State program. Most States have been authorized under the Act to issue such permits, which typically contain effluent standards and limitations, and monitoring and reporting requirements.

The holder of a Federal NPDES or a State-issued permit is subject to an enforcement action by EPA or a State for failure to comply with the conditions of the permit. A Federal enforcement action may include administrative, civil, or criminal penalties. State enforcement programs may include civil and criminal penalties, and may include other means of enforcement. In the absence of Federal or State enforcement, a citizen who has an interest that is or may be adversely affected may commence a civil action, under "citizen suit" provisions included in the Clean Water Act, against any person (including the United States and any other governmental instrumentality) alleged to be in violation of, among other things, the conditions of a Federal or State NPDES permit or a Federal or State order.

While the citizen suit provisions in the Clean Water Act serve as a safety net in instances where the regulatory agency does not enforce the water quality laws, the provisions have resulted in allegations of misuse in a number of lawsuits and out of court settlements.

## CITIZEN SUITS

Section 505 of the Clean Water Act grants "any citizen" the right to commence a civil action on his own behalf against "any person" who is "alleged to be in violation of" its NPDES permit. A "citizen" is "a person or persons having an interest which is or may be adversely affected." (Clean Water Act § 505(g).) A "person" is "an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." (Clean Water Act § 502(5)) Section 505 also allows for a citizen to commence a suit against EPA,

where EPA has failed to perform a duty under the Act that is not discretionary. The Act requires would-be citizen plaintiffs to provide, to the alleged violator, the State in which the violation is alleged to be occurring, and EPA, an advance notice of intent to file a suit, at least 60 days prior to filing the suit.

Actionable ongoing violations exist when a defendant's violations have continued after the date the plaintiff files suit, or there is a reasonable likelihood that the defendant will violate the Act again in the future. A citizen may not commence a suit under the Act for one-time, or "wholly past," violations.

The relief sought by a citizen plaintiff may include an injunction requiring compliance with a permit limitation, the assessment of civil penalties, and the costs of litigation, including attorney and expert witness fees, where appropriate. No compensatory damages are authorized under the Act. Penalties are paid to the U.S. Treasury. However, settlements between citizen plaintiffs and defendants requiring defendants to pay funds for other purposes are not prohibited. As a result, in settlements of litigation, citizen plaintiffs routinely seek and defendants pay funds for other purposes, including for "supplemental environmental projects" or environmental trust funds administered by an environmental group, as well as attorney fees. (Supplemental environmental projects may also be an element of settlements in enforcement cases brought by Federal or State regulators.)

Sections 505 and 309 of the Act set out certain instances where citizen suits are barred. Generally, dismissal of a citizen suit is required where the defendant can demonstrate that either the State or EPA is concurrently maintaining an

action over the same alleged violations. A citizen may not bring a citizen suit to enforce the Act where either EPA or the State is "diligently prosecuting" a civil or criminal action regarding the same violations. Enforcement actions in a court of law will bar a citizen suit, as will some administrative enforcement proceedings. A citizen may not bring a citizen suit for violations for which EPA or the State has commenced and is diligently prosecuting an administrative action to assess penalties, or for which either EPA or the State has issued a final order not subject to further judicial review and the alleged violator has paid a penalty assessed under the Act or comparable State law. The determination of what constitutes diligent prosecution of a government enforcement action sufficient to bar a citizen suit is based on a number of factors. These factors include whether compliance has been or will be achieved, whether the enforcement activity has resulted or will result in installation of the necessary pollution control equipment or upgrades, whether the initial enforcement action has been followed up as necessary, and, in some cases, whether penalties were sought or paid.

The U.S. Supreme Court has observed that the bar on citizen suits when government enforcement action has been taken or is under way "suggests that the citizen suit is meant to supplement rather than to supplant governmental action." (Gwaltney of Smithfield v. Chesapeake Bay Foundation, 484 U.S. 49 (1987) ("Gwaltney").) Citizen suits are proper only "if the Federal, State, and local agencies fail to exercise their enforcement responsibility." (Id., citing S. Rep. No. 92-414, at p. 64 (1971)).

The Federal Circuit Courts of Appeals are not uniform in determining whether a State's enforcement action and issuance of an enforcement order bars a citizen suit under

the Clean Water Act. In some Circuits, a State's enforcement action and issuance of an enforcement order bar a Clean Water Act citizen suit. (See, e.g., North and South Rivers Watershed Association v. Town of Scituate, 949 F.2d 552 (1st Cir. 1991) ("Scituate"); Ailor v. City of Maynardville, Tennessee, 368 F.3d 587 (6th Cir. 2004) ("Ailor").) The U.S. Court of Appeals for the First Circuit has said that the "focus of the statutory bar to citizen's suits" is "on whether corrective action already taken and diligently pursued by the government seeks to remedy the same violations as duplicative civilian action." (Scituate.) "Duplicative enforcement actions add little or nothing to compliance actions already underway, but do divert State resources away from remedying violations in order to focus on the duplicative effort" (Id.) Duplicative actions "are, in fact, impediments to environmental remedy efforts," "so long as the provisions in the State Act adequately safeguard the substantive interests of citizens in enforcement actions." (Id.) The Sixth Circuit similarly has observed that a citizen suit, which has been filed where a State is already diligently prosecuting an enforcement action for the same violations, changes the "nature of the citizens' role from interstitial to potentially intrusive." (Ailor.)

This, however, is not the case in States such as California, which are within the jurisdiction of the Court of Appeals for the Ninth Circuit. Under the Act, a citizen may not bring a citizen suit for violations for which EPA or the State has commenced and is diligently prosecuting an administrative action to assess penalties, or for which either EPA or the State has issued a final order not subject to further judicial review and the alleged violator has paid a penalty assessed under the Act or comparable State law. (Clean Water Act, § 309(g)(6).) The Ninth Circuit has

interpreted this language strictly and has held that the existence of an enforcement action, alone, will not bar a citizen suit for the same violations unless EPA or the State has commenced and is diligently prosecuting a judicial action or an administrative action to assess penalties, or the alleged violator has actually paid an administrative penalty.

In Citizens for a Better Environment, et al. v. Union Oil Company, 83 F.3d 1111 (9th Cir. 1996) ("Union Oil"), the Ninth Circuit determined that an administrative settlement with the State was insufficient to bar a citizen suit under the Clean Water Act. (Union Oil.) In Union Oil, the court said that, before a State administrative action can preclude a citizen suit under the Clean Water Act, it must be commenced under a provision of State law comparable to Section 309(g) of the Act, including notice and comment procedures and penalty assessment factors. (Id.) According to the Court, unless a penalty is assessed according to a provision of state law that is comparable to Section 309(g), there is no guarantee that the public will be given the requisite opportunity to participate or that the penalty assessed is of the proper magnitude. (Id.) The Union Oil court declined to follow the First Circuit's Scituate case, as it concluded the Scituate holding could lead to an anomalous conclusion that State administrative enforcement actions would more broadly preclude citizen suits than would EPA enforcement actions. (Id.)

## POTENTIAL FOR MISUSE OF CITIZEN SUITS

Congress envisioned that citizen enforcement of the Clean Water Act would be a useful supplement to government agency oversight, given limited resources at both the State

and Federal levels and the potential that some States might not be sufficiently vigorous in implementing the law. Many citizen lawsuits have been filed since enactment of the Act in 1972, and have played a positive role in addressing water quality issues in a number of instances.

Concerns have been raised, however, that some citizen suits do little or nothing to enhance water quality, because the suits involve violations that are already being addressed in an enforcement action with government regulators and/or that they focus on what can be characterized as minor, sporadic, or technical violations. Concerns also have been expressed that citizen suits are subject to being misused, for example, when a citizen suit and the threat of very substantial litigation costs and penalties associated with it, is used to exact payment of significant settlements, including sizeable plaintiffs' attorney fees. The bases for these concerns are that such citizen suits have little or no economic or environmental value added, and the substantial transaction and settlement costs associated with such suits would divert funding from necessary infrastructure and environmental projects.

Recent experiences reported in the State of California illustrate some of these problems. Numerous third party citizen lawsuits have been brought against communities in California alleging Clean Water Act violations, even though State regulators already may have taken enforcement action against the communities. Some of the communities include Lake County, Fort Bragg, Los Angeles, Cotati, Covelo, Crescent City, El Dorado, Eureka, Fallbrook, Fortuna, Healdsburg, Occidental County, Pacific Grove, Petaluma, Redding, Santa Rosa, Sonoma County, and Willits, California. Sixty-day notice letters have been sent to additional communities, including Forestville,

Occidental, Russian River, Santa Rosa, Sea Ranch, Sonoma County, and Wikiup, California. Many of the suits have been brought by the same plaintiff, who has sought significant settlement payments and attorney fees from the communities. It is in part the prevalence of citizen suits by the same plaintiff that has created a sentiment on the part of some California communities that the law is being misused.

A State, including California, could institute a timely action to bar a citizen suit under the citizen suit provisions of the Clean Water Act, which would stay the citizen suit until the State action is completed, but in the case of the communities listed above, it appears the State did not do so. Some communities, including some of those listed above, that are faced with the threat of very substantial litigation costs and penalties if they lose, decide to reach settlements rather than litigate the issues. The terms of these settlements are reviewed by the presiding judge, the attorney general, and EPA.

Regulators sometimes decline to assess administrative penalties against a municipality, particularly if they are fairly small and have only limited financial resources. The regulators often prefer to allow the community's limited resources to be directed at improvements that will prevent future violations and improve water quality. However, even though the regulators have exercised their enforcement powers in these cases, citizen suits are still allowed to proceed in the Ninth Circuit when penalties were not sought.

In several cases, the State has placed the community's wastewater facility under one or more enforcement orders that direct the local agency to take steps to correct violations

within a specified timeframe prior to the filing of a citizen suit. For example, the Lake County Sanitation District has been subject to ongoing enforcement, including cease and desist orders, by the State regulatory agency at two of the District's treatment plants and associated sewer collection systems. As a result of the State enforcement, the District has implemented several new programs to address the community's compliance issues. Because the District had not paid a monetary penalty as part of the State enforcement actions, under Ninth Circuit case law, the plaintiff's suit was not barred under the Act. Subsequently, the State issued a complaint for monetary penalties against the District for what the community has said are many of the same violations cited by the plaintiff, and the District is now faced with defending both a citizen lawsuit and an administrative enforcement action. A witness at the hearing, from Lake County, is expected to discuss the enforcement actions the State has brought against his and other communities in Northern California, steps the communities are taking to address their compliance issues, and their experiences in being sued under the Act's citizen suit provisions, despite being subject to ongoing enforcement over the same issues.

In the City of Fort Bragg, the State issued a series of enforcement orders requiring the City to upgrade certain of its wastewater infrastructure in order to meet its effluent limitations. The State also had proposed changes to the City's permit to more accurately reflect limits applicable to the technologies used at the City's treatment plant. Here, too, the City remained vulnerable to a citizen suit because it had not yet completed resolving all of its alleged compliance issues, and had paid no penalties. The City received a 60-day notice letter, alleging violations

that the community has said had been addressed in the State's enforcement orders. A citizen suit was subsequently filed. The City settled the suit prior to litigation, with a settlement agreement and order in which the City agreed to, among other things, pay attorney fees and costs to the plaintiffs lawyer, and additional money to a public education fund. The full cost of the suit to the City was in the order of $150,000, much of which was directed to actions not required for or related to compliance with the City's permit requirements. Another witness, from Fort Bragg, is expected to describe the enforcement actions the State brought against his community, the steps his community has taken to come into compliance, and the community's experiences in dealing with the threat of a citizen suit involving what the community has said were the same issues.

The State also had already issued administrative complaints or orders to other small and larger communities, including Los Angeles, when they were sued by citizen plaintiffs. A witness from Los Angeles is expected to discuss the City's long-standing case that was only recently settled with citizen plaintiffs, the State, and EPA. The case stemmed from a number of wastewater overflows that occurred between 1993 and 1998, including from the record-breaking El Nino rainy season in 1998. In the case, the State originally sought to enforce against the City for the overflows as well as other small spills caused by root and grease blockages. In September 1998, the City and State agreed to settle the enforcement action by agreeing to a cease and desist order and well over a half billion dollars worth of major sewer projects to be completed on an accelerated schedule, and paying an $850,000 civil penalty. Despite the settlement, however, a month and a

half later, in November of the same year, the citizen plaintiffs filed a citizen suit against the City concerning the same sewer outfalls that were recently addressed by the State's Cease and Desist Order. Here, the plaintiffs' suit was allowed to proceed, despite the City's prior settlement, because the plaintiffs had alleged that the City would have future overflows, while the remedial projects were underway. The plaintiffs demanded $550 million in penalties be paid to the United States.

After six years of litigation and millions of dollars of litigation costs, the City reached a settlement with the citizen plaintiffs, and with the State and EPA (both of whom joined the lawsuit in 2001). The witness is expected to testify that the settlement addressed the same violations already dealt with in the 1998 settlement between the City and State, and imposed much the same requirements that the City had already agreed to in the 1998 settlement. The witness also is expected to testify that the citizen suit did not yield additional water quality benefits beyond what the State's 1998 enforcement action had achieved, and cost the citizens of Los Angeles millions of dollars in litigation costs.

Congress envisioned that citizen enforcement of the Clean Water Act would be a useful supplement to government agency oversight, but was not intended to supplant governmental action. It remains appropriate, where a regulator is not diligently enforcing the Clean Water Act, that citizen suits be available to fill the gap. However, there are questions whether all citizen suits under the Clean Water Act are serving that function.

## WITNESSES

### PANEL I

City of Fort Bragg
*Honorable Jere Melo*
Mayor Fort Bragg, California

California Association of Sanitation Agencies
*Mr. Mark Dellinger*
Special Districts Administrator
Lake County, California

Association of Metropolitan Sewerage Agencies
*Mr. Christopher M. Westhoff*
Assistant City Attorney
Department of Public Works General Counsel
Los Angeles, California

amsa

Association of
Metropolitan
Sewerage Agencies

**TESTIMONY OF THE**

**ASSOCIATION OF METROPOLITAN SEWERAGE AGENCIES (AMSA)**

**September 30, 2004**

**Presented by**

**CHRISTOPHER M. WESTHOFF**
**Assistant City Attorney**
**Public Works General Counsel**
**Los Angeles, California**

**Submitted to the**

**SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT**

**in**

**WASHINGTON, DC**

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**Testimony of Christopher Westhoff**
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**Los Angeles, California**
**on behalf of the**
**Association of Metropolitan Sewerage Agencies**

**Introduction**

Good morning Chairman Duncan, Congressman Costello, Congressman Thompson, and members of the Committee, my name is Chris Westhoff. I am an Assistant City Attorney for the City of Los Angeles and I have served as General Counsel to the City's Department of Public Works for over 20 years. I am also a Board member of the Association of Metropolitan Sewerage Agencies ("AMSA") and serve as AMSA's Secretary and as Chair of AMSA's Legislative Policy Committee. AMSA represents nearly 300 clean water agencies across the country. AMSA's members treat more than 18 billion gallons of wastewater each day and service the majority of the U.S. sewered population.

On behalf of AMSA and the City of Los Angeles, I would like to thank you, Chairman Duncan, and the members of this Committee for your continued commitment to clean water issues – in California and nationwide. Your dedication to solving the challenges our communities face across the nation, including in Los Angeles, is essential to achieving the goals of the Clean Water Act.

Our nation's streams, rivers, lakes and oceans are cleaner today than they have been in over half a century. This has been accomplished by the unparalleled efforts of the many cities, special districts, municipalities, and industries that discharge treated effluent into the waters of the United States. The backbone of the transformation of America's waters has been the Federal Clean Water Act.

Hundreds of billions of dollars have been spent by the federal government, states, industries, and cities around the country to bring our nation's waters to their current condition. And, we must continue to spend billions more to maintain the improvements we have achieved to date and

to continue moving forward in the pursuit of improving the quality of our receiving waters.

Without question, the efforts of the governmental regulators entrusted with enforcement authority under the Clean Water Act – and in cases, the actions of citizens and environmental organizations stepping in when governmental regulators neglected to act – have contributed to our national water quality improvements. However, the natural tension between appropriate governmental regulatory action and citizen enforcement frequently has placed permitted entities like my City in a losing battle.

The drafters of the Clean Water Act clearly saw *governmental enforcement* against permitted dischargers as the critical element in the ultimate success of the intent of the Act. In the Act itself, *citizen enforcement* was designed to play a secondary, supplementary role, allowed only when the appropriate governmental regulators failed to diligently prosecute a permit holder for violations.

Yet today, the combination of court precedent and the U.S. Environmental Protection Agency's ("EPA's") narrow interpretation of its own regulations has skewed the intent of Congress concerning citizen enforcement. Today, permitted dischargers like my City, in California and across the country, routinely suffer the indignity, negative publicity, and substantial financial burden of having to respond to third party lawsuits brought by environmental activist groups for substantially the same violations addressed in prior enforcement actions by our regulators.

The concept of "double jeopardy" is fundamental in American jurisprudence. While not rising to the level of actually violating this foundational cornerstone, when a permitted discharger has already answered to its governmental

regulator in an enforcement action, it is patently unfair for the permit holder to be required to address the same issues in a third party lawsuit filed under the citizen suit provisions of the Clean Water Act. When regulators diligently enforce, citizen suits should be precluded.

Nonetheless, Los Angeles just finished six years of litigation initially filed in 1998 by a third party citizen group, the Santa Monica Baykeeper, and ultimately joined years later by the EPA and the U.S. Department of Justice. This citizen suit was brought *notwithstanding the fact that the City had settled an enforcement action for the same violations with our state permitting entity in the month immediately prior.*

Because of its size and reputation, Los Angeles may not engender a lot of sympathy when it finds itself as the victim of a lawsuit filed by an environmental group. However, if it can happen to Los Angeles, it can happen to any other permitted discharger – industrial, special district, or municipality – large or small across this nation.

Los Angeles has a municipal wastewater collection system that consists of close to 7,000 miles of pipe ranging from six inches to over 12 feet in diameter. In the winter of 1998 Los Angeles experienced an "El Nino" climatic condition which resulted in one of the wettest winters in 120 years of recording such statistics. In the month of February 1998 alone, we received over 14 inches of rain, the rainiest February on record. To put this in perspective, the average total rainfall *for a year* in Los Angeles is just over 15 inches.

Needless to say, the City's wastewater collection system was overtaxed and experienced overflows during this rainy winter. Close to 50 million gallons of wastewater spilled

from the City's pipes in Winter 1998. The good news in this experience was that even with the incredible amount of rain we experienced, the wastewater that spilled from the system was confined to six distinct locations in the City – and projects to remediate these six locations were already underway. I know 50 million gallons seems like a large number, but to give you a frame of reference, Los Angeles transports close to 190 *billion* gallons of wastewater a year – so even in this extraordinarily wet year, the City still only spilled less than ½ of one percent (.005 percent) of all the wastewater collected that year, and kept 99.995 percent of the wastewater in the pipes.

The City's permitting regulator sought to enforce against the City for these spills as well as other small spills caused by root and grease blockages. In September 1998, the City agreed to settle the enforcement action by agreeing to a Cease and Desist Order from the regulator and paying an $850,000 penalty ($200,000 in cash and $650,000 in environmental projects). Further, Los Angeles agreed to construct major sewer projects totaling over $600 million on an accelerated schedule of just over six years. One project alone was the largest single public works project ever awarded by the City of Los Angeles at just over $250 million for a 12 foot diameter mainline sewer tunnel. This project was built in a compressed timeframe through the simultaneous use of four tunnel boring machines, the first time this was ever done.

In October of the same year, the Santa Monica Baykeeper held a press conference and announced their lawsuit concerning the exact same sewer spills addressed by the Cease and Desist Order issued by the City's permitting regulator just one month before. You may wonder why the Baykeeper's suit was not precluded by our prior settlement.

Because all they had to allege is that the City would have future spills – while our remediation projects were underway – and their case could proceed. To complicate matters, in January 2001, the EPA, through the Department of Justice, filed yet another lawsuit – this one covering the *same spills* as the Cease and Desist Order and the Baykeeper lawsuit, and adding on small spills that had occurred between 1998 and 2001.

It is important to note that in the six years since the 1998 "El Nino" winter, Los Angeles has had *only four* wet weather related spills. All other spills during that time frame have been caused by root and grease blockages. Also, in the six years since 1998, the average yearly volume of wastewater spilled out of the Los Angeles collection system has been one ten thousandth of one percent (.000001%) of the total volume collected. That is a pretty good batting average in any league except the Clean Water Act. You see, EPA's interpretation of its own Clean Water Act regulations is that all spills from a separate sanitary sewer collection system are flatly prohibited, regardless of volume, cause, or impact on water quality.

Even with our comprehensive maintenance program, a municipal wastewater collection system works at its heart like your pipes at home – only our systems are dramatically larger with more potential spill points. When do you call Roto Rooter® out to your house, before or after you have a backup? And, unlike a homeowner who can stop running water when they have a blockage in their line to prevent a spill out of a toilet, sink or bathtub; the wastewater in our pipes keeps coming 24 hours a day, seven days a week, and 52 weeks a year.

EPA has publicly documented that *even the best run, best maintained separate City sewer systems will overflow.* And yet, using a strained regulatory and legal analysis, EPA and enforcement authorities take a strict liability approach to these inevitable overflows. This makes every community with separate sewers an *easy target* for enforcement by third party plaintiffs.

The hard dollar cost to my City of our recent citizen suit experience – and let me reiterate that we were sued *after we had been diligently enforced against* by our regulator – reads like this: City's outside attorney fees, almost $5 million; Baykeeper attorney fees, $1.6 million; other citizen intervenors attorney fees, over $400,000; penalties, $800,000 (cash), $8.5 million (environmental projects). And this figure does not account for the incredible amount of staff time spent supporting the litigation effort and diverting staff from their core responsibilities. I can attest that this duplicative citizen suit did not yield additional environmental benefit to the citizens of Los Angeles – although it is the citizens' money that ultimately pays for needless litigation and attorneys fees through rising sewer rates.

Let me be clear. No one is asking that citizen suits go away. As responsible environmental stewards, we realize that the citizen suit provision of the Clean Water Act is a powerful and necessary tool – *to fill enforcement gaps.* Where a regulator is not diligently enforcing the Clean Water Act, citizen suits are a critical and important *secondary* source of Clean Water Act enforcement. However, where Congress' intended prime Clean Water Act enforcer has done or is doing its job, municipalities need protection from redundant third party lawsuits that will raise the cost of the clean water services we provide.

Let me conclude by stating that AMSA would welcome the opportunity to work with this Subcommittee to discuss ways to focus future third party lawsuits against municipalities where Congress intended them – where there is an enforcement gap. I note that some of the witnesses today will offer the Subcommittee specific reforms to begin this dialogue. We will be pleased to contribute to the process.

Again, I thank you for your attention to this important issue. At this time, I would be happy to answer any questions.

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[LOGO]

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**TESTIMONY OF THE**

**CALIFORNIA ASSOCIATION OF SANITATION AGENCIES**

**Presented by**

**MARK DELLINGER**
**SPECIAL DISTRICTS ADMINISTRATOR**
**LAKE COUNTY, CALIFORNIA**

**Submitted to the**

**SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT**
**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**
**U.S. HOUSE OF REPRESENTATIVES**

**WASHINGTON, DC**

**September 30, 2004**

Ensuring Clean Water For California

Good Morning, Mr. Chairman and Members of the Subcommittee:

I am Mark Dellinger, Special Districts Administrator for the Lake County Sanitation District in Northern California. It is my privilege to address the Subcommittee today on behalf of the California Association of Sanitation Agencies (CASA). CASA is a statewide nonprofit association of over 100 local public agencies that provide wastewater collection, treatment, disposal and water recycling services to millions of Californians. Lake County Sanitation District is a member of CASA.

There is no question that citizen enforcement has played an important role in the implementation of the Clean Water Act and other environmental statutes. Congress envisioned that the role of the citizen lawsuit would be to supplement, not supplant, the primary enforcement function of the States and the federal government. In recent years in California, however, we have seen a cottage industry develop in which plaintiffs' attorneys file citizen suit after citizen suit against numerous local agencies without regard to the magnitude or the environmental impact of the alleged violations, and despite the fact that communities may already be taking steps to rectify their situations, either voluntarily or because the State or USEPA has already undertaken administrative enforcement action.

The Clean Water Act imposes strict liability upon regulated entities. Local public agencies are required to conduct thousands of analytical tests each year, so it is not surprising that there may be a few exceedances. The results must be reported in the form of public records. Thus, establishing a Clean Water Act case is generally very simple. And no matter how strong a showing the local agency can make that it is doing everything it can to comply with its permit and protect water quality, proof of even a handful of violations over a five year period is sufficient to render the plaintiff a "prevailing party" entitled to payments of attorneys fees and costs. As local agencies strive to comply with ever changing, increasingly stringent regulatory requirements, every violation, however minor, is accompanied by the specter of possible administrative enforcement and citizen litigation.

I would like to briefly discuss the Lake County Sanitation District's experience, summarize the experiences of several

other communities around the State, and close by offering the Subcommittee some suggestions for reform that we believe will help to reinforce the original intent that citizen litigation serve as a "gap filler," to provide a safety net for the enforcement of real environmental violations where the government fails to step in.

**The Lake County Sanitation District** manages and operates four wastewater treatment plants and is responsible for 200 miles of sewer collection pipes. We serve a large geographic area that is relatively rural, with a low population density, which makes it more difficult and costly to manage. The median household income in the communities we serve is 62% of the statewide average. In recent years, the District has undertaken a number of capital improvement projects, implemented an enhanced spill response program and made staffing changes to reduce overflows of treated effluent from our treatment facilities as well as to control overflows from our sewer system. Our Board recently approved a series of rate increases to raise revenues to improve our entire system. In addition, the District has received federal and state grant funding for our Full Circle project, which involves supplying our treated effluent to recharge the Geysers steam field. We see this as a win-win situation; water quality is improved due to the beneficial reuse of our effluent as an alternative to discharge, and the Geysers project generates clean energy for California residents and businesses.

These types of improvements do not happen over night, of course, and unfortunately, as the District has worked to implement its long-range plans, violations of its state discharge permits have occurred, some of which may also be violations of the Clean Water Act. The State regulatory

agency, the Regional Water Quality Control Board, placed one of the District's two largest treatment systems under an enforcement order, which requires that certain actions be taken by specified dates. The Regional Board was contemplating taking similar enforcement action for the District's Southeast Regional system, but had not yet issued an administrative order when a so-called "citizen group," Northern California River Watch, sued the District in October 2003 for alleged violations of the Clean Water Act at both of the treatment plants and the associated sewer collection systems. Because the District had not paid a monetary penalty as part of the State enforcement and compliance actions, under Ninth Circuit case law, River Watch's suit was not barred by Clean Water Act Section 1319(g). After River Watch's suit was filed, the Regional Board issued a complaint for monetary penalties against the District for some of the same violations, and the District is now faced with the worst of both worlds: expending its limited resources to defend a citizen lawsuit and paying potentially duplicative penalties in a parallel administrative enforcement action. This is surely not what Congress envisioned.

Other witnesses you will hear from today will tell their similar stories. I would just like to mention a couple of other examples of citizen lawsuits against public agencies to assist the Subcommittee in understanding that Lake County's experience is not unique.

In January 2000, in response to a significant sewer overflow from **the City of Pacific Grove's** collection system into surface waters, the Regional Board levied a $70,000 fine, required payment toward a supplemental environmental project, and set forth specific directives to upgrade and enhance Pacific Grove's sanitary sewer collection

system. The City paid the fine and began implementing the programs and asset improvements as directed. In June, 2003, the Ecological Rights Foundation filed a citizen suit against Pacific Grove for alleged violations of the Clean Water Act based on very small sewer overflows, overflows that most likely did not reach navigable waters, and the 2000 overflow in response to which Pacific Grove had already undertaken several new programs to address the prevention of sewer overflows. The resulting consent decree largely memorialized the work the City was already undertaking and did not measurably enhance water quality protection. All but two of the overflows alleged in the complaint were less than 100 gallons. The majority of the alleged violations were less than 20 gallons and did not make it to the Bay. Pacific Grove will pay plaintiffs $300,000. The amount of fees and costs the plaintiff requested were over $400,000, all of which were allegedly incurred within one year and without going to trial. The aggressive pursuit of litigation versus meaningful settlement negotiations was the major factor in the large fees incurred.

**The El Dorado Irrigation District**, located in the Sierra foothills, experienced a series of wastewater compliance issues caused by growth in the local service area, combined with a wastewater treatment facility which – unknown to the District until it was too late – was not capable of functioning to its designed capacity. The facility discharged treated water into a seasonal stream that would not have existed without the facility's discharge. Despite the facility's difficulty in meeting all of its permit requirements, the water it discharged into the stream had allowed a thriving ecosystem of native fish, plants, animals, and birds

to develop and to survive and flourish through the dry summer months.

In order to meet its permit requirements more consistently, the District embarked on a fourteen million dollar treatment plant upgrade project. The project was proceeding under the oversight of the Regional Water Quality Control Board, which was also processing an enforcement order for penalties for past violations, when the California Sportfishing Protection Alliance filed a citizens' suit seeking penalties for exactly the same permit violations.

Even after the District paid a $105,000 penalty to the Regional Board, the Sportfishing Protection Alliance refused to dismiss its suit. The District was ultimately compelled to pay an additional $140,000 for a supplemental environmental project in lieu of penalties and $160,000 in costs and attorneys fees to settle the citizens' suit simply to avoid the continued cost of litigation. Although supplemental environmental projects are supposed to bear some relationship to the harm caused by the violations, the project selected by the citizen's group was for riverbank restoration tens of miles away from the wastewater treatment facility in an area that had never been affected by the District's facility.

**The City of Healdsburg**, located in the Northern California wine country, instituted a state-of-the-art sewer maintenance program to eliminate any risk of sewer system overflows. Although it had no sewer system overflows for over three years, and there had been only two overflows in the two years before that (each of which was due to blockages in private laterals, not in the public system), Northern California River Watch filed a notice of intent to file a citizens' suit seeking affirmative injunctive

relief and penalties for sewer system overflows. Healdsburg met with River Watch's attorney and made their entire set of public records available for review to demonstrate the effectiveness of their program. Nonetheless, the citizen group filed the lawsuit and, after Healdsburg had defended itself for over a year and spent tens of thousands of its taxpayers dollars on it own attorneys, the citizen's group settled for no penalties and only $7,500 in attorneys fees.

In 1995, a citizen group filed its first lawsuit against **the City of Santa Rosa**. The City won the first lawsuit at trial and on appeal. The same citizen group sued the city again in 1998 and then settled after the city agreed to pay for environmental remediation and a portion of the attorneys' fees and costs. The citizen group agreed not to sue the city for violations that might occur before a date in the future. In 2000, **the City of Santa Rosa** was sued for a third time by the same attorney representing substantially the same plaintiffs. Throughout the time all three lawsuits were initiated and pending, the City was under a Cease & Desist Order issued by the Regional Water Quality Control Board, under which the City was required to develop and implement a reclaimed water disposal project within a specific time schedule. That project was later implemented in compliance with the state-issued enforcement order.

Prior to the filing of the third lawsuit, the State commenced a comparable enforcement action (seeking monetary penalties) against the City by publishing notice and scheduling a hearing regarding the issuance of a complaint for administrative penalties against the City. However, because the penalty order was not issued until *after* plaintiffs' lawsuit was filed, the Federal District

Court found that the state's comparable enforcement action did not bar the plaintiffs' lawsuit.

The City was not only fined $98,350 by the RWQCB for violations alleged in the third lawsuit but also settled the third lawsuit for a total of $195,000 ($75,000 in attorneys fees and $120,000 to fund a grant program). Under the terms of the settlement of the third lawsuit, plaintiff Northern California River watch agreed not to sue the City pursuant to the Clean Water Act for a period of four years. On July 15, 2004 – exactly two months after the expiration of the stipulated moratorium on litigation – River Watch filed a Notice of Intent to Sue Santa Rosa for what can best be described as "creative" interpretations of the Act and the City's permit. This will be the fourth Clean Water Act lawsuit against the City in less than 10 years.

There are many more examples like these. I want to emphasize that none of these communities were "perfect," in that each of them had experienced compliance problems and did not have spotless records. The important point is that in each case, either the community was already acting by itself or the State had already stepped in and programs were being implemented to guard against similar future violations. Just as the citizen suit was intended to supplement government action, it was also intended to be "forward looking." Citizens may not sue for wholly past violations. Given the length of time it takes to plan, finance and construct improvements, many agencies find themselves in a gray area where even though they have committed to a specific set of improvements, they cannot avoid occasional violations while these upgrades are being made.

From CASA's point of view, reform is needed to ensure that citizen suits serve their intended purpose of supplementing limited government enforcement resources and preventing future violations. I would like to briefly mention several potential reforms for the Subcommittee's consideration.

**Clarify Availability of Attorneys Fees:**

The availability of attorneys fees is without question a significant motivation for some third party plaintiffs to bring or threaten lawsuits. Under the Clean Water Act, a "prevailing" citizen plaintiff is entitled to attorneys fees and costs; a prevailing defendant may only recover fees if it can demonstrate that the plaintiff's suit was frivolous or entirely without merit. Thus, except in the most ill advised cases, there is very little downside to pursuing litigation for a third party plaintiff. Contrast that with the circumstance of a local public agency defendant that knows it has a strong case against sizeable penalties but nonetheless has some exposure because of a few minor violations. If the defendant goes all the way through trial, even if it significantly reduces the penalty assessed, it may find itself on the hook for not only its own attorneys' fees, expert fees, and costs, but also similar costs and fees incurred by the plaintiff. These facts place the plaintiff's attorney in a very strong bargaining position with regard to settlement.

Of all of the possible reforms, revisions to the attorneys' fees provisions of the Act are most likely to bear fruit, as the availability of these fees is what is motivating many of the abuses. With that in mind, CASA recommends that the Subcommittee consider the following:

- Limit attorney fee awards to the degree of success on the claims included in the complaint. For example, if a plaintiff alleges 100 violations and proves 10, plaintiff should able to recover only a proportionate amount in fees.

- Issue a clear statement of congressional intent that the attorney fee provision of the Act be read as reciprocal, so that attorneys' fees are available to the prevailing party – period. The language of the Act supports this reading, but the Courts have interpreted the language to allow prevailing plaintiffs to recover fees while prevailing defendants are held to a much more difficult standard.

- Place a cap on the amount of fees that may be obtained in a lawsuit against a public agency. The cap could be set as either an absolute cap or as a percentage of any penalties assessed. In the latter case, a proportionate cap would insure fees are not disproportionate to the nature of the violations actually proven. While these steps may not prevent "nuisance" suits, they would limit a community's potential exposure to exorbitant fees and make it less of a target.

**Reinforce Primary Role of the States**

Congress specified that no citizen suit could be maintained where the State or the USEPA is "diligently prosecuting" an action against the alleged violator. Given the time it takes to process a State enforcement action, the fact that the State is already "diligently prosecuting" is not enough to bar a citizen suit. In addition, the Ninth Circuit has determined that only a State enforcement action requiring the payment of monetary penalties will serve as a defense to a citizen lawsuit. Because achieving compliance rather

than punishment is generally the goal of water quality enforcement actions, the State or USEPA will often choose not to require payment of monetary penalties preferring to allow the agency to spend its limited resources on fixing the problem. In light of this, we ask the Subcommittee to consider:

- Requiring courts to consider the improvements and actions already being undertaken by the community either on its own initiative or pursuant to an enforcement order, a capital improvement program, or master plan, etc. The citizen suit should not go forward unless it can be shown it is likely to "trigger" further, significant and necessary improvement or redress the violations in a manner supplemental to those already underway. Courts could be authorized and encouraged to stay citizen litigation while the improvements already contemplated by the community are developed and implemented.

- Clarifying that where the State has already taken, or is in the process of taking, an enforcement action for violations, citizen litigation for the same or similar violations is barred, whether or not the State action is complete or included the assessment of monetary penalties. The 60 day window within which government is supposed to act is simply not adequate time for a state regulatory agency to investigate alleged violations, evaluate the appropriate enforcement approach, issue a complaint, provide an opportunity for public notice and comment, hold any required hearing and complete the action. It should be sufficient for the State or USEPA to make a determination as to whether it intends to enforce within a specified number of days. If the government decides to bring an action, the citizen suit should be stayed

> pending initiation and resolution of the agency enforcement action. If the State enforcement action is not completed within a reasonable period of time, the third party plaintiff could then proceed with its suit.

There may be other reforms suggested here today. CASA is very appreciative of the Subcommittee's interest and leadership in finding solutions to the citizen suit abuses. We urge the Subcommittee to consider carefully the various options for improving the law and ensuring that citizen suits against local government only proceed where they will promote real environmental solutions. Local agencies want to be partners with the federal government and the states in achieving water quality improvements. Diverting attention, limited resources, and energy to defend third party lawsuits where compliance solutions are already underway is counterproductive and disheartening.

Thank you for your time. Melissa Thorme, an Attorney with the Sacramento law firm of Downey Brand, LLP, and a Member of CASA's Attorneys Committee, is here with me and we would be pleased to answer any questions that the Subcommittee may have.

[LOGO]

CITY OF FORT BRAGG

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**TESTIMONY PRESENTED BY**

**JERE MELO**
**MAYOR**
**CITY OF FORT BRAGG, CALIFORNIA**

**Submitted to the**

**SUBCOMMITTEE ON WATER RESOURCES AND ENVIRONMENT**
**COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE**
**U.S. HOUSE OF REPRESENTATIVES**

**WASHINGTON, DC**

**September 30, 2004**

**Mr. Chairman and Members of the Subcommittee:**

Thank you and your staff for the invitation to present testimony to the Subcommittee today.

My name is Jere Melo, and I am the Mayor, City of Fort Bragg, California. The City is located about 150 miles north of San Francisco, right on the Pacific Ocean. Fort Bragg is a city of about 7,000 residents, and it serves a population of 18,000 to 20,000 persons who live and work along about 65 miles of the California coast.

I refer you to the details in the "City of Fort Bragg Case Study", which is attached hereto. My presentation will be as a small town mayor, not as an NPDES permit or Clean Water Act legal expert.

**"Are Citizen Suit Provisions of the Clean Water Act Being Misused?"**

To get right to the point of this hearing, I believe the citizen suit provisions of the Clean Water Act are being misused. The City of Fort Bragg has been damaged by the provisions for citizen suits. We were faced with the uncertainty and expense of a threatened citizen lawsuit against the discharges from our waste water treatment plant. We believe we were in compliance with our NPDES permit for nearly all of the alleged violations listed in the citizen complaint, but the time and cost to defend the charges was beyond the diminished return. And so, we came to a settlement with the citizen group in order to cut our losses.

I believe it is important to state that in our case, the citizen group was not made up of local, concerned citizens. The group was from a city about 100 miles from Fort Bragg and located in a different county.

**Citizen Suits Have Been Used Against Many Cities, Sanitation Districts and Businesses in the Redwood Empire and Across California.**

Fort Bragg's experience is not unique. Nearly all of the cities in our part of California have encountered citizen suits. One particular, larger city, Santa Rosa, has been challenged several times, all with the same result. Each city, or sanitation district, settled before the matter went to court. The potential cost of defending the suit and the

uncertainty of prevailing on all points raised makes a settlement the most cost-effective solution.

Businesses are also not exempt from citizen suits. There are some manufacturing operations that have an NPDES permit and a waste water treatment process. The same group that challenges publicly-owned treatment plants is the group that threatens suit against business. To some degree, the citizen suit can be a job-killer, in that the cost to settle makes the cost of production rise, and plants become marginal with increases in costs.

I am very active in environmental policy matters through the League of California Cities. I tell you that the experience I relate to you about Fort Bragg and its neighboring cities is becoming more frequent throughout California. As more plaintiff's attorneys see the possibility of easy money in settlements, there are more threats of citizen suits. It is a matter that deserves at least the attention this subcommittee is giving.

**Citizen Suits Come From Small Groups**

Earlier I indicated that the group that threatened our city with a citizen suit is located about 100 miles away. It is also a very small group. The membership of this group, Northern California **Riverwatch**, seems to consist of less than 10 persons. **Riverwatch** has threatened and collected settlements from all of the cities in our area. In one case of the larger city being challenged multiple times, **Riverwatch** changed its name, but the persons involved were the same. And so, the citizen suit provisions of the Clean Water Act have been co-opted as a new business of threatened litigation and a real goal of extracting money from entities that treat waste water.

**Riverwatch Does Not Promote Water Quality Improvements**

Once a settlement is complete, there is little interest from our so-called citizen group. The "book" on a **Riverwatch** threat is to suggest a settlement as soon as possible. While the first reaction to a settlement is a rejection, no one has waited long for the settlement negotiations to begin. And they always begin with discussion about their cost to prepare the threat, some costs for their board members to review your plant and process and some other funding for public groups or pet projects.

In Fort Bragg's case, we paid $12,000 to a **Riverwatch** selected consultant to review our plant. In an unmitigated promotion of his private business, his recommendation was to purchase his brand of water treatment chemicals, the "White Knight" brand, as I recall. Now this consultant is a **Riverwatch** board member.

Another provision was to set aside $35,000 in an educational fund, which we did. A group known locally as "Noyo Watershed Alliance" (the Noyo River is the primary water source for Fort Bragg) was given control of the funds for education or land use improvement. The group has unanimously agreed to work to relocate a county road in three locations where very substantial amounts of sediment are now placed in the river. **Riverwatch** is objecting to the use of funds for this work. My best guess is that **Riverwatch** wants the $35,000 to end up in someone's pocket of its choosing, rather than eliminating three substantial sources of sediment to a stream providing habitat for coho salmon and steelhead trout.

**RECOMMENDATION**

The citizen suit provisions of the Clean Water Act need amendment to prevent misuse. The current system, as applied in the Redwood Empire of California, essentially allows allegations of water quality violations to lead to cash settlements, even where the public agency is already subject to a compliance order and has made commitments toward better operation and maintenance or constructing new facilities or processes. There is no consideration for a record of otherwise good performance, no consideration for a record of investment for improvements, and no consideration for working with regulatory agencies to achieve consistent compliance and to make continued improvements. Some additional burden of reason and proof needs to be placed on those who threaten a federal suit, prior to filing the 60-day notice, and such suits should be forbidden where a city or other permittee is already under a compliance order, notwithstanding that penalties were not paid. We look forward to any help you can provide to us in this regard.

Thank you,

Jere Melo
Mayor of Fort Bragg (CA)

City of Fort Bragg Case Study:

The City operates a small trickling filter sewage treatment plant rated for 1 million gallons per day in dry weather, but can reach as high as 5-7 million gallons per day in wet weather due to large rain events.

*State Action*: On January 23, 1997, the Regional Water Quality Control Board issued Cease and Desist Order No.

97-2, which required repairs to the City's collapsed biofiltration process. The secondary biofilter was repaired in September, 1997.

On December 10, 1998, another Cease and Desist Order ("CDO") No. 98-126 required the preparation of a plan to meet the City's effluent limitations, which were not based on the type of treatment plant operated by the City. The City submitted the plan in February, 1999 and included a time schedule for proposed improvements.

On March 22, 2001, the City's permit was scheduled to be renewed by the Regional Water Quality Control Board, including proposed changes to reflect limits for "treatment equivalent to secondary treatment" applicable to the City's trickling filter plant. However, following comment by RiverWatch, the Board took no action on the permit, but rescinded CDO No. 98-126 and adopted CDO No. R1-2001-23, which modified the time schedule for improvements. Because the permit was never changed, the City remained subject to permit limits not appropriate for the type of treatment plant it operated and made the City vulnerable to citizen suits for permit violations.

*The Citizen Suit*: In February of 2001, after the Regional Water Board had already issued enforcement orders, RiverWatch sent a 60-day notice letter alleging continuing violations of effluent limits, failure to comply with NPDES permits and reporting requirements, and discharge of raw sewage and pollutants into the Pacific Ocean. The case, which was settled prior to litigation, resulted in a Consent Decree issued July 9, 2002.

*Case Results*: As a result of the citizen suit filed by River Watch, the City of Fort Bragg:

- As part of the RiverWatch requirements during the settlement process, the City had to retain Bob Rawson, selected by Jack Silver, to conduct an audit/evaluation of Fort Bragg's collection system and treatment facility at a cost of $12,000. Bob Rawson proceeded to review and make recommendations for treatment plant improvements. One of his recommendations was that the City use a biological product that Rawson just happened to sell. Mr. Rawson is a current member of the RiverWatch Board.

- Paid $25,000 in attorneys fees and costs to Jack Silver plus an equivalent amount in fees to the City's own attorneys.

- Set up a Public Education fund in the amount of $35,000, currently being overseen by the Noyo Watershed Alliance, and now being disputed by Jack Silver.

- The City developed and implemented a grease trap ordinance and inspection program to reduce the risk of improper disposal of grease by restaurants in the City.

- Hired Nute Engineering to complete a prechlorination study of the wastewater treatment facility for a cost of $5,000.

- Began the process of addressing inflow and infiltration (I/I) issues. The City has authorized expenditures of $50,000, which was necessary to secure grant funding totaling nearly $720,000 to perform the work. Complete by May 30, 2007, all sewer line repairs identified in a report prepared by the City in 2000.

- Nute Engineering nearly completed the design of the Sand Filter Project as required by the Cease

> and Desist Order at a cost of approximately $35,000. This project is no longer necessary because of the City's implementation of a permanent chemical feed process that has brought the City into compliance.

The full cost of the suit was in the range of $150,000 to upwards of $200,000 and required the City to do things already obligated to do under the Cease and Desist Order or to do things not required or not related to compliance with the City's permit requirements.

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No. 04-889

Supreme Court, U.S.
FILED
JAN 18 2005
OFFICE OF THE CLERK

# In The Supreme Court of the United States

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**MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,**

***Petitioner,***

**v.**

**FRIENDS OF MILWAUKEE'S RIVERS AND LAKE MICHIGAN FEDERATION,**

***Respondents.***

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

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## AMICUS CURIAE BRIEF OF THE CSO PARTNERSHIP IN SUPPORT OF PETITIONER

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**Date: January 18, 2005**

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## MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

1. The Combined Sewer Overflow Partnership ("CSO Partnership") moves pursuant to Supreme Court Rules 37(b) and 33.1 for leave to file the enclosed amicus curiae brief in this case for the reasons set forth below.

2. The CSO Partnership sought the consent of all of the parties to the filing of this amicus brief. Petitioner Milwaukee Metropolitan Sewerage District consented to the filing while Respondents Friends of Milwaukee's Rivers and the Lake Michigan Federation withheld consent.

3. The CSO Partnership represents communities throughout the United States with combined sewer systems. The CSO Partnership's members have invested hundreds of millions of dollars in planning, designing, permitting and construction of combined sewer overflow facilities and are regulated under federal and state law. The CSO Partnership's members strive to protect public health and the environment in an affordable and cost-effective manner.

4. The decision by the United States Court of Appeals for the Seventh Circuit in *Friends of Milwaukee's Rivers v. Milwaukee Metropolitan Sewerage District* (Pet. App. 1a – 33a) misconstrues the Clean Water Act as it applies to combined sewer overflow systems and establishes a procedure for the review of consent decrees which, in the context of combined sewer overflow systems, will essentially prevent communities from entering consent decrees with state or federal authorities to plan for future upgrades to their sewer systems. The impact of this decision on combined sewer overflow communities will be severe because planned investments in sewer systems costing billions of dollars will no longer be subject to court approval

and communities will be unable to set budgets for these enormous expenditures of public resources.

5. The CSO Partnership's amicus brief fully complies with Supreme Court Rule 37.1 because it "brings to the attention of the Court relevant matter not already brought to its attention by the parties" and it "may be of considerable help to the Court." The CSO Partnership's unique nationwide perspective and expertise on the subject matter of this case will assist the Court in considering the issues raised in petitioner's petition for writ of certiorari.

Accordingly, the CSO Partnership moves for leave to file the enclosed amicus brief.

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## INTEREST OF AMICUS

The CSO Partnership is a national association of communities with combined sewer systems. Partnership members have been recognized for years by the U.S. Environmental Protection Agency and by states for their proactive compliance programs. The Partnership participated in the development of EPA's national combined sewer overflow policy (" the CSO Policy") and led the effort to have the CSO Policy incorporated into the Clean Water Act (the "Act"), 33 U.S.C. § 1342(q).

Many of the Partnership members have more advanced combined sewer overflow ("CSO") control programs than their peer communities nationwide. Most Partnership members have either negotiated state or federal enforcement mechanisms to implement their CSO long-term control plans or they are in the process of doing so. The state and/or federal settlement agreements Partnership members have entered into were not developed consistent with the Seventh Circuit's "no realistic prospect" standard. Accordingly, the significant public investments made to date by Partnership members pursuant to these agreements following agency enforcement actions could be jeopardized by intrusive citizen suits that would be permissible under this standard. Moreover, Partnership members' ability to arrive at final long-term control plans ("LTCPs") with federal and state enforcement agencies would be subject to the Seventh Circuit's "no realistic prospect" test rather than the more deferential tests adopted by other federal circuit courts.

## SUMMARY OF ARGUMENT

Certiorari should be granted in this case to correct the Seventh Circuit's erroneous ruling that government enforcement actions must ensure "no realistic prospect" of future violations in order to preclude citizen actions under the Clean Water Act for the same alleged non-compliance. The Seventh Circuit's ruling in this regard is erroneous for the following reasons:

- The Seventh Circuit's "no realistic prospect" standard under the Act impermissibly and incorrectly adopts and expands Second Circuit precedent. The Seventh Circuit and Second Circuit standard for judging when a state is diligently prosecuting conflicts with cases from the First, Sixth and Eighth Circuits and a prior decision of this Court;

- The standard precludes essential iterative or phased solutions to achieving compliance with the Act;

- The standard requires the district court to accord only "some" deference to government enforcement decisions and upsets the Act's scheme of giving primary enforcement authority to states and the federal government.

- The standard is based upon the misreading of the Act as requiring the elimination of overflows rather than the control of overflows. Notably, the Act only requires the elimination of dry weather overflows and not the wet weather overflows that are at issue in this case; and

- It would allow and encourage a reopening of existing agency enforcement actions adopted by courts nationwide by citizen groups, to the detriment of the

massive public investments made in reliance on those actions.

Based upon the foregoing, the CSO Partnership urges the Court to grant certiorari to review the decision of the Seventh Circuit in this case. Certiorari is necessary to resolve the conflict between the circuits over the proper enforcement of the Act, and avoid creating uncertainty over tens of billions of public dollars being invested to control sewer overflows.

## ARGUMENT

### I. THE SEVENTH CIRCUIT'S RULING THAT THE DILIGENT PROSECUTION BAR ONLY APPLIES WHEN GOVERNMENT ACTION GUARANTEES NO FUTURE VIOLATIONS WILL OCCUR CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND A PRIOR DECISION OF THIS COURT.

In remanding the case to the district court, the Seventh Circuit pronounced a standard for determining when a governmental action will constitute diligent prosecution and thereby bar a plaintiff's citizens' suit under the Act. The Court ruled that plaintiffs' suit may proceed if the district court concludes that "there is a realistic prospect that violations due to the same underlying causes," purportedly addressed by the State of Wisconsin's action against Milwaukee, "will continue after the planned improvements are completed." Pet. App. 33a. In other words, only if the district court finds that the Wisconsin-Milwaukee state court decree guarantees that future violations will not occur will the State action cut off the citizens' suit.

The Seventh Circuit's "no realistic prospect" standard is not found anywhere in the Act and fundamentally disrupts the enforcement structure of the Act.[1] Under the Act, federal and delegated state agencies have primacy in enforcement, with citizen suits allowed only where the government declines to act or to where the citizen suit supplements the reach of government enforcement. The Seventh Circuit standard would impermissibly disrupt this fundamental statutory construct by allowing citizen suits where the governmental agencies decided to act, but not to the extent (according to citizen plaintiffs and federal judges) of preventing a "realistic prospect" of continuing violations. Nowhere is this immense intrusion into agency enforcement countenanced in the Act and, in fact, this approach is in direct conflict with this Court's decision in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60 (1987), which recognized that "the citizen suit provision is meant to supplement rather than to supplant governmental action," as petitioner explains in its petition. Pet. 11-13.

## II. THE SEVENTH CIRCUIT'S RULING WILL PRECLUDE ESSENTIAL PHASED OR ITERATIVE APPROACHES BY GOVERNMENT ENFORCEMENT.

The Seventh Circuit's "no realistic prospect" standard is not only inconsistent with the express structure of the

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[1] The Seventh Circuit's decision extends and significantly expands a decision by the Second Circuit which created – out of whole cloth – the "realistic prospect" requirement that government enforcement will cause the violations to cease before government enforcement would cut off citizen suits. *See Atlantic States Legal Found. Inc. v. Eastman Kodak Co.*, 933 F.2d 124, 127-28 (2nd Cir. 1991). As petitioner sets forth in its petition for writ of certiorari, these decisions by the Seventh and Second Circuits conflict with decisions by the First, Sixth, and Eighth Circuits. Pet. at 20-26.

enforcement provisions of the Act, but it would effectively preclude phased or iterative governmental approaches to compelling compliance. Instead of imposing phased solutions, delegated state agencies and EPA would be forced to always seek ultimate solutions, even when doing so would require the crafting of highly speculative injunctive relief to be implemented over decades.[2]

That is neither contemplated nor required under the Act. Instead, the intent of the Act is that when the governmental agency initiates an arms-length enforcement action, it cuts off citizen involvement. As the Senate Report in the legislative history of the Act noted, the "Committee intends the great volume of enforcement actions [to] be brought by the State" and that citizen suits are proper only "if the Federal, State and local agencies fail in the exercise of their enforcement responsibility." S. Rep. No. 92-414, p. 64 (1971), reprinted in A Legislative History of the Water Pollution Control Act Amendments of 1972, p.1482 (1973). Phased and iterative approaches or solutions imposed in arms-length actions by enforcement agencies are routinely adopted by the courts, as they should be. Under the Seventh Circuit's decision, however, a government agency that announced a phased or iterative approach would surely fail the "no realistic prospect" standard and thereby open the door for intrusive rather than supplemental litigation by citizen plaintiffs.

As explained below, solutions to collection system overflows are often the largest public works projects in communities' histories and can take decades to implement, at costs for large cities like Milwaukee in the billions of

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[2] As the Seventh Circuit noted in citing *Breaking the Vicious Circle: Toward Effective Risk Regulation, Stephen Breyer, 28 (Harvard Univ. Press 1993),* regulatory or enforcement actions requiring perfect solutions in an effort "to achieve the last 10 percent" are often improper expenditures of public resources. Pet. App. 31a-32a, note 15.

dollars. Thus, iterative or phased compliance approaches are both necessary and appropriate and yet would be precluded under the Seventh Circuit's expanded "no realistic prospect" standard.[3]

## III. THE SEVENTH CIRCUIT'S RULING FAILS TO ADEQUATELY DEFER TO GOVERNMENT ENFORCEMENT DISCRETION IN THE CRAFTING OF ENFORCEMENT RELIEF.

Beyond impermissibly forcing governmental agencies to craft ultimate solutions in every enforcement action and then defend the adequacy of those solutions from attack by citizen plaintiffs, the Seventh Circuit's "no realistic prospect" standard puts the federal courts in an untenable position of second-guessing, rather than deferring to the adequacy of injunctive relief sought by enforcement agencies. Specifically, federal district court judges will sit as "super agencies" to determine whether the relief sought by governmental agencies will ensure "no realistic prospect" of continuing violations.

These courts will be asked to speculate about the potential for sewer overflows in a community after potentially decades of work called for in state or federal enforcement actions. Moreover, where state or federal enforcers properly admit uncertainty about ultimate solutions and, instead of speculating with public funds,

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[3] While the judicial creation of the "no realistic prospect" standard conflicts with the Act's enforcement scheme in any context, it is one thing to apply such a standard to discharges from Eastman Kodak's very carefully controlled manufacturing operation at its one industrial facility in Rochester, New York and entirely another for the Seventh Circuit to apply such a standard to how the sewers in the greater Milwaukee area will respond to large future rainfall events. *Atlantic States Legal Foundation, 933 F. 2d at 125.*

seek to impose a phased solution, the court will be required under the "no realistic prospect" test to allow a citizen suit to proceed to force the very additional controls which the agencies did not believe could or should be ascertained at this time. This approach impermissibly and unreasonably allows citizen plaintiffs to intrude in, rather than supplement, agency enforcement.

Citizen plaintiffs who may be unhappy with the intensity of governmental enforcement are supposed to wait until after the government mandated relief is implemented before seeking to have the federal courts impose additional measures. This does not mean that citizen plaintiffs cannot bring a challenge to the adequacy of federal enforcement actions. A federal consent decree must be lodged with the approving court for public notice and comment pursuant to 28 C.F.R. § 50.7, giving citizens an opportunity to challenge whether the agency is requiring adequate injunctive relief over the period addressed by the agency's enforcement action. Nothing in the Act prohibits an agency from imposing phased or iterative enforcement solutions if, in the agency's expertise, such an approach is necessary and appropriate.

Beyond the Seventh Circuit's writing into the Act of the "no realistic prospect" approach, the Court also creates a new standard of review of agency enforcement action. Specifically, instead giving deference to a state's enforcement action, the Seventh Circuit instructs the federal district court to accord only "some deference to the judgment of the State." Pet. App. 33a. This is a significant departure from the careful enforcement scheme established in the Act and should be corrected through a grant of certiorari. This lesser degree of deference is particularly inappropriate given the fact that the states in these cases will have already taken enforcement and the citizen's role at that point becomes supplementary. Accordingly, in

these circumstances, logic dictates that the enforcement agencies receive greater rather than lesser deference from the courts.

## IV. THE SEVENTH CIRCUIT'S RULING IS IMPRACTICAL BECAUSE SOLUTIONS TO MANY SEWER OVERFLOW CASES WILL REQUIRE DECADES OF WORK AND CONSTANT PROGRAMMATIC RENAVIGATION TO ACHIEVE COMPLIANCE WITH THE ACT.

Combined sewer systems were among the earliest sewer systems constructed in the United States and were built until the earliest part of the 20th century. Projects designed and constructed to control sewer overflows typically involve the largest public works projects in communities' histories. These massive public works projects cannot be implemented overnight and almost always require periodic renavigation. In general, the renovation of aging systems requires installing a new generation of sewer infrastructure beneath America's urban core communities.

Consent decrees addressing sewer overflows are, by necessity, iterative documents setting forth procedures for adjustments over time and are a work in progress aimed at achieving appropriate controls in a fiscally responsible manner. Such consent decrees generally set forth a schedule for completing certain planned construction projects, leaving certain future decisions to be made after the progress of initial projects is evaluated. For example, the following provision related to sanitary sewer overflows ("SSO's") is contained in a 2003 consent decree entered by the U.S. District Court for the Southern District of Ohio:

> WHEREAS, the SSO decree includes explicit recognition of the need expeditiously to

> commence discussions regarding global solutions to address the remaining sewer system issues, and further recognizes that because the schedule for implementing the remaining remedial measures that are to be proposed under the Capacity Assurance Program Plan required by the SSO decree is related to certain other sewer system solutions, the SSO Decree neither requires implementation of, nor provides a final construction completion date for, the SSO remedial measures that will be proposed under the Capacity Assurance Program Plan pursuant to the SSO Decree[4]

This paragraph is a perfect example of the iterative approach that is typically taken when agencies seek to impose sewer overflow control requirements in decrees. Such an acknowledgement does not meet the Seventh Circuit's "no realistic prospect" test of whether future violations will occur, because this is an admission that the planning necessary to address ongoing violations has yet to occur. The public solutions here are as of yet unknown. In these circumstances, the Seventh Circuit's "realistic prospect" test would allow a citizen suit to be maintained to force a solution that is not yet ripe. In the context of wet weather-related sewer overflows, there are diminishing returns – significantly higher costs associated with controlling the last few overflows from the largest storm events. We cannot imagine a greater intrusion on agency enforcement primacy than allowing a citizen group to force a premature and speculative solution to a substantially unknown set of facts that will not be presented for possibly decades.

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[4]*See,http://www.msdgc.org/downloads/consent_decree/global_cd_signed.pdf*

If courts were to mandate that only consent decrees which at the outset guarantee no future overflows will occur could receive court approval, future consent decrees would not be possible, and already negotiated and approved decrees would be subject to being overturned by citizen suits filed by groups seeking to undo the relief already negotiated. It is contrary to this Court's decision in *Gwaltney* to allow citizen groups to interfere with agency enforcement actions that have been negotiated and are being implemented. Such intrusive actions will, contrary to the Act and this Court's precedent, preclude affordable and cost-effective public CSO and SSO controls.

In all cases, sewer overflow control is achieved using public dollars -- literally billions of them. The federal courts should be loathe to create any standard that would require speculative commitments of public funds at the behest of citizen groups who are too impatient to await the outcome of the implementation of arms-length government enforcement.

## V. THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THE CLEAN WATER ACT AND THE COMBINED SEWER OVERFLOW POLICY.

In reaching its decision to reverse the district court and find that the federal citizens' suit was not barred, the Seventh Circuit relied on an incorrect reading the Clean Water Act's provision on combined sewer overflows. 33 U.S.C. § 1342(q). The Court wrongly determined that the Act requires the "elimination of overflows," not just their reduction. Pet. App. 30a-31a. Reviewing only the record in the case, the Court stated "we do not feel confident" that the agreement will result in the "elimination" of the overflows and thus found that the 2002 Stipulation, which did not call

for the elimination of all future overflows, was contrary to the Act. Pet. App. 31a.

The Court's view that all combined sewer overflows must be eliminated in order for a prosecution to be diligent is flatly contradicted by the CSO Policy which was incorporated by reference into Section 1342(q) of the Act. The CSO Policy does not mandate the elimination of all overflows and, in fact, expressly contemplates that entities using best management practices and being in full compliance with the policy will, in most cases, be unable to completely eliminate overflows. The purpose of the policy, as the name implies, is the control of overflows, not the total elimination of all overflows at any cost. The policy recognizes that CSO systems "overflow as a result of wet weather systems" and the policy provides "targets" for CSO "controls" and calls for a coordinated planning effort to achieve "cost effective controls." 59 Fed. Reg. at 18688. Finally, the policy provides for the "necessary flexibility to tailor controls to local situations." 59 Fed. Reg. at 18688.

Moreover, section II.4.a of the CSO Policy lays out several compliance options, including, for example, one that would expressly authorize up to six residual CSOs a year. 59 Fed. Reg. at 18692. In fact, while the CSO Policy calls for the elimination of dry weather overflows from a combined sewer system it expressly only requires the control of wet weather overflows. The CSO Policy expressly acknowledges that it may be impracticable technically and financially to remove or relocate CSO discharges away from even "sensitive" areas such as stream segments above public drinking water intakes. 59 Fed. Reg. at 18692.

With regard to wet weather overflows, one of the four key principles of the CSO Policy is that:

> State water quality standards authorities will be involved in the long-term CSO control planning effort as well. The water quality standards authorities will help ensure that development of the CSO permittees' long-term CSO control plans are coordinated with the review and possible revision of water quality standards on CSO-impacted waters.

This means that not only are residual overflows contemplated, as opposed to the total elimination sought by the Seventh Circuit, but that state designated uses and water quality standards are envisioned to be revised to accommodate them. This "key provision" of the CSO Policy would be rendered superfluous by the Seventh Circuit's ruling that all overflows had to be eliminated.

The United States Environmental Protection Agency and the United States Department of Justice have recognized, in a number of different contexts, that the CSO Policy does not mandate the elimination of all overflows. A joint Department of Justice and Environmental Protection Agency memorandum addressing key issues arising in negotiations of combined sewer overflow consent decrees refers to "discharges remaining after the implementation of the LTCP."[5] Obviously, if elimination of overflows is the end-goal of a CSO long-term control plan, then there would be no reason to address residual overflows after the implementation of a CSO long-term control plan.

Recent consent decrees in major combined sewer overflow cases also demonstrate that the goal is not the total

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[5] See DOJ/EPA Memorandum on Negotiation of Combined Sewer Overflow Consent Decrees dated September 16, 2003, which can be located at *http://www.cso.com/articles-publications/publication/guidance-negotiationsofCSOConsentDecrees.pdf*

elimination of all combined sewer overflows. In a recent Department of Justice press release announcing "a milestone legal agreement," resolving allegations against CSO discharges in the District of Columbia, the Department stated that under the settlement, 96% of the District's CSO volume would be captured on a system-wide basis in an average rainfall year, thus recognizing that the complete elimination of overflow was not feasible, especially in wet years.[6]

Finally, EPA's August 2004 Report to Congress entitled "Impacts and Control of CSOs and SSOs" provides further support that Congress and the executive branch have expressly recognized that the elimination of sewer overflows is not achievable in the foreseeable future.[7] Chapter Nine of the Report addresses the resources spent to address the impacts of CSOs and SSOs in the past and in the future. EPA estimates that to provide primary treatment and disinfection for 85% of combined sewer overflow volume, the future capital financial needs alone (not including operation and maintenance costs) of communities will be $50.6 billion. The projected capital costs for "reducing the frequency of SSOs caused by wet-weather and other conditions" is estimated at $88.5 billion. Thus, EPA expressly recognizes that even in the future with these vast sums of money being spent on CSOs and SSOs, the best that can be achieved are reductions in overflows, not the elimination of them.

## VI. THE ADVERSE FINANCIAL IMPACT OF INVALIDATING AGENCY ENFORCEMENT APPROACHES FOR CSO COMMUNITIES IS SUBSTANTIAL.

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[6] *See http://www.usdoj.gov/enrd/DC_Sewer_Consent_Decree.pdf; http://www.dcwasa.com/news/listings/press_release208.cfm.*

[7] *http://cfpub.epa.gov/npdes/cso/cpolicy_report.cfm?program_id=5.*

The Seventh Circuit's "no realistic prospect" requirement and ruling in this case will lead to inferior environmental solutions to sewer overflows and unnecessarily higher public costs as enforcement agencies will require communities to over-plan, design, and construct to meet this new judicially-created standard.

The best way to ensure no "realistic prospect" of continuing sewer overflows is to separate storm water flows out of sanitary sewer lines in combined sewer communities such as the District of Columbia. However, such an approach results in an urban storm water discharge virtually every day it rains, instead of other CSO solutions that may feature wet weather storage and treatment that limit urban wet weather discharges to a handful of days a year. The latter is a superior result from both a human health and environmental perspective. However, "capture and treat" approaches are less certain than separation, such that a federal judicial requirement of "no realistic prospect" for future overflows will lead some communities and enforcement agencies toward inferior but more certain solutions such as sewer separation.

Moreover, if the federal judicial test is now "no realistic prospect" of future overflows for a plan to pass muster in the federal courts, rather than cost-effective phased solutions, communities will be forced to implement greater controls than they otherwise might under a phased approach. This means more planning, design and enormous construction costs -- literally billions of dollars in potentially unnecessary investments in public infrastructure.

The 2004 EPA Report to Congress found that CSO and SSO communities nationwide spent $535 billion between 1970 and 2000 on wastewater infrastructure. Report, p. 9-3. EPA estimates that current annual spending from all public sources in wastewater infrastructure is just over $13 billion a

year. As noted in Section II above, EPA has estimated future CSO spending at $50.6 billion to control 85% of CSO flows and future SSO spending at $88.5 billion. Report p. 9-3. Three recent consent decrees demonstrate how expensive the upgrades to these systems are for individual communities and the level of investments required by the cities. The most recent settlement, which was lodged with the federal district court in the District of Columbia on December 16, 2004, but not yet approved, calls for the District to pay $1.4 billion to "nearly eliminate" overflows into the Anacostia River, the Potomac River, and Rock Creek.[8] The projects set forth in the decree will take twenty years to build. In August of 2004, the City of Los Angeles agreed to a $2 billion settlement to resolve two lawsuits filed against it concerning sewage overflows. Under the terms of the settlement, Los Angeles will, in part, be required to rebuild at least 488 miles of sewer line.[9] Finally, in December 2003, Cincinnati agreed to a $1.5 billion settlement to resolve allegations against it for both CSOs and SSOs. The decree requires that Cincinnati's work must "be completed as expeditiously as possible, but no later than February, 2022."[10] The Cincinnati decree expressly acknowledges that the costs may exceed $1.5 billion, in which case additional time would be allowed under the decree.

If the Seventh Circuit's decision is not overturned and other courts were to adopt a similar standard when deciding whether a case has been diligently prosecuted, communities will face difficult and costly choices about whether to negotiate consent decrees with governmental authorities given that they may still be subject to suits from citizen groups even after promising to pay enormous sums of money to update their sewer systems. Cities will be discouraged

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[8] *http://www.usdoj.gov/opa/pr/2004/December/04_enrd_793.htm*
[9] *http://www.usdoj.gov/opa/pr/2004/August/04_enrd_542.htm*
[10] *http://www.usdoj.gov/opa/pr/2003/December/03_enrd_660.htm*

from entering into settlements with state or federal regulatory agencies because they will be asked to develop plans that ensure no realistic prospect of violation, which will call for gross speculation on the communities' part with massive amounts of public funds. In cases where decrees are negotiated, cities will have little protection from lawsuits by citizen groups second-guessing the governmental agencies and arguing for other remedial measures, when expensive projects have already been committed to. Under the Seventh Circuit's ruling those lawsuits will require detailed fact finding by the courts with only some deference to EPA or its state counterpart. If nothing else this litigation will delay the implementation of injunctive relief imposed by the enforcement agencies. This is not how Congress intended the citizen suit provision under the Act to be applied.

## CONCLUSION

The Court should grant the petition for writ of certiorari to resolve the heightened conflict between the circuit courts addressing when an enforcement agency is diligently prosecuting under the Act. This issue was not fully addressed in the Court's *Gwaltney* decision. Resolution of this question will affect the investment of tens of billions of public dollars in sewer overflow control programs across the country.

Respectfully submitted,

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